

## Boston College Third World Law Journal

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Volume 26 | Issue 2

Article 1

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4-1-2006

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### Recommended Citation

Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. Third World L.J. 207 (2006), <http://lawdigitalcommons.bc.edu/twlj/vol26/iss2/1>

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# AVOIDING ANOTHER STEP IN A SERIES OF UNFORTUNATE LEGAL EVENTS: A CONSIDERATION OF BLACK LIFE UNDER AMERICAN LAW FROM 1619 TO 1972 AND A CHALLENGE TO PREVAILING NOTIONS OF LEGALLY BASED REPARATIONS

CARLTON WATERHOUSE\*

**Abstract:** The growing body of literature on reparations consists primarily of articles showing that black reparations are consistent with various legal theories, promote racial justice, or further broader societal goals like eliminating poverty and promoting education. This article takes the distinct position of challenging reparations supporters to justify their confidence in the legal system to deliver meaningful reparations for slavery and segregation in light of the historic use of law as a means of instantiating white racial supremacy and the prospective individualistic approach to race adopted by contemporary judges and legislators. The article also challenges those who oppose reparations based on its supposed unfairness to contemporary citizens to explain how their position differs from that of past generations who opposed reparations and related legal efforts to redress racial injustices as unfair at that time. To support the challenge to reparations commentators, the article examines the historical framework of blacks' relationship to the law through legislation and court rulings from 1619–1963. The article closes by presenting an alternative approach to reparations focused on building and strengthening black political, economic, and educational institutions.

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*If you stick a knife nine inches into my back and pull it out three inches, that is not progress. Even if you pull it all the way out, that is not progress. Progress is healing the wound, and America hasn't even begun to pull out the knife.*

—El Hajj Malik El Shabazz (Malcolm X 1964)

## INTRODUCTION

In a series of children's books and a recent feature film, Lemony Snicket chronicles the lives of the Baudelaire orphans—three orphaned children from a wealthy family imperiled by a conspiring unscrupulous adversary, a neglectful guardian, and an otherwise dangerous world.<sup>1</sup> Following the demise of their parents, these children find themselves subject to the schemes of uncaring adults seeking to gain their sizable fortune.<sup>2</sup> Instead of rescuing them, the intervention of a neglectful banker responsible for providing them with a safe environment merely carries them from one set of unfortunate events to another.<sup>3</sup> To survive, the children draw on their own unique abilities to stay alive and escape the plots launched against them.<sup>4</sup> The title for this article emanates from that story because it offers a helpful, albeit imperfect, metaphor for blacks' experiences under law in America, from their arrival in 1619 to the close of the second reconstruction in 1972 and beyond.<sup>5</sup>

Rather than a crowning achievement of American democracy, the civil rights legislation of the 1960s and 1970s represented one more step in a series of unfortunate legal events that ultimately reflected the dominant attitude of society's white majority toward ending the Jim Crow practices of the south.<sup>6</sup> Despite their role in removing the

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<sup>1</sup> See generally LEMONY SNICKET, *A SERIES OF UNFORTUNATE EVENTS* (1999).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> I chose 1619 and 1972 based on the milestones in black experiences in America that these dates represent. 1619 marks the arrival of the first blacks in the American colonies aboard a Dutch man-o-war. These men were traded into servitude following their arrival. See A. LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 20 (1978) (discussing the first Africans' enslavement in what would become America). Three centuries later, the United States Congress passed the Equal Employment Opportunity Act. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. This act represents the last of a series of civil rights laws passed from 1964 to 1972 to proscribe racial discrimination in America. See generally ROY L. BROOKS ET AL., *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES* (1995).

<sup>6</sup> See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 5–6 (2004) (discussing the historic relationship between civil rights laws and broader society); Derrick A. Bell, *Brown v. Board of Educa-*

imprimatur of legal legitimacy from much overt discrimination against blacks and others, these laws were merely a continuation in a series of unfortunate legal events.<sup>7</sup> The courts' subsequent rejection of affirmative action as a remedy for historic racial bias, and the shifting legal standards applied in Equal Protection, Title VI, and Title VII civil rights cases, over the intervening thirty-three year period, reflect the most recent events in the unfortunate series.<sup>8</sup> Like the Baudelaire orphans, blacks still have not found a guardian whom they can depend on to protect them from those who would betray their rights.

This article contends that America's laws and legal system constitute a poor guardian for blacks against the "the tyranny of the majority" because, in historic and contemporary analysis, they respond to and facilitate majoritarian racial bias in the executive, judicial, and legislative contexts.<sup>9</sup> Rather than a general claim regarding all contemporary legal matters, this article asserts that legal issues explicitly regarding race such as affirmative action, civil rights law, and reparations reflect a majoritarian racial bias.<sup>10</sup> In light of the foregoing, schol-

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tion and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 521 (1980) (considering the benefit that civil rights laws provided to the United States' predominant white majority). Civil rights legislation of the period was necessitated by the Supreme Court's rejection of similar laws almost one hundred years earlier, during the Reconstruction Congress. See *infra* notes 78, 275–77 and accompanying text. The changed attitude of many white northerners, and some white southerners, about Jim Crow segregation precipitated the Civil Rights Era more than prescient legal argument.

<sup>7</sup> Employing the metaphor used by Malcolm X in the quote above, the civil rights laws of the 1960s and 1970s were not progress but the removal of the knife from black America's back without healing the wounds caused by 344 years of lawful maltreatment. See *infra* Part I for a discussion of reparations as a systematic process undertaken to heal the wounds of slavery, segregation, and systematic subordination.

<sup>8</sup> Although this article does not address the past thirty years of civil rights law, others have sufficiently chronicled the Congressional and the Supreme Court's retreat from the racially based civil rights positions and decisions of the late 1960s and early 1970s. See Kimberle' Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336–37 (1988); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1051–52 (1978); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 23 (1991).

<sup>9</sup> This article draws on blacks' historical experience under law and the majoritarian limits of American democracy to deliver equal justice in formulating its critique of the legal systems ability to provide black reparations. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 248–52 (Heirloom ed., Arlington House 1966) (1835) (examining the majoritarian limits of American democracy); Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 278–86 (1997) (examining the Supreme Court's role as a majoritarian institution in significant cases involving the rights of blacks and other minorities).

<sup>10</sup> This corresponds to the "Restrictive View" of civil rights law. See *infra* text accompanying notes 313–20.

ars and activists advocating legal based reparations for American slavery and its legacy display what this article asserts is an unwarranted degree of confidence in the American legal system.

Specifically, the article challenges those supporting legal based reparations to explain their reliance on the legal system to provide reparations despite the historic and contemporary legal subordination of blacks and other racial minorities when it corresponds with the perceived interest of the majority. The article also challenges those opposing reparations, however, based on its supposed unfairness to America's current citizens, to explain how their position differs from that of past generations of legal scholars and politicians who opposed reparations and related legal efforts to redress racial injustices. Failure by commentators, on both sides, to address law's historic role of protecting the interest of the racial majority by subordinating blacks' just legal claims presages a tenuous posture for legal reparations—a posture this article argues may encourage the development of yet another chapter in a series of unfortunate legal events.<sup>11</sup>

Recent federal court decisions regarding the victims of the Tulsa, Oklahoma race riots and a suit by the descendants of enslaved blacks for reparations illustrate this point.<sup>12</sup> In 1921, white rioters ravaged Greenwood—Tulsa, Oklahoma's African American neighborhood—indiscriminately killing and injuring the community's residents in the process.<sup>13</sup> In 2004, survivors of the riot and their descendants brought a

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<sup>11</sup> If we consider the fact that no United States Congress or federal court to date has been willing to provide reparations to black Americans for slavery, much less the general harms of Jim Crow segregation and related discrimination, despite recurring arguments and requests to do so, then confidence that legislation or judicial cases will provide an acceptable award or provision of reparations seems unwarranted. See *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 309–14 (Roy L. Brooks ed., 1999). See generally *SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS* (Raymond A. Winbush ed., 2003). This confidence can be distinguished from the confidence in the legal system displayed by Thurgood Marshall and others in their campaign to end Jim Crow segregation. Marshall and others predicated their assault on Jim Crow laws upon a northern precedent of integrated educational facilities and southern states' failure to provide equal services, facilities, etc. that the Court's argument in *Plessy v. Ferguson* required. See KLARMAN, *supra* note 6, at 290–320.

<sup>12</sup> See *Alexander v. Oklahoma (Alexander II)*, 382 F.3d 1206, 1211 (10th Cir. 2004); *African-American Slave Descendants Litigation*, 375 F. Supp. 2d 721, 732 (N.D. Ill. 2005).

<sup>13</sup> "The riot destroyed an estimated 1,256 homes along with churches, schools, businesses, even a hospital and library in the African-American community of Greenwood. Between 100 and 300 people were killed." *Alexander v. Oklahoma (Alexander I)*, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at \*1 (D. Okla. Mar. 19, 2004). In *Alexander II*, the federal district court offered the following description of the riots in its opinion:

claim against the city and state for damages associated with the riot.<sup>14</sup> In affirming the judgment of the United States District Court for the Northern District of Oklahoma granting a summary judgment motion for the defendants, Chief Circuit Judge Deanell Reece Tacha wrote, “[t]he **Tulsa Race Riot** represents a tragic chapter in our collective history. While we have found no legal avenue exists through which Plaintiffs can bring their claims, we take no great comfort in that conclusion.”<sup>15</sup>

A recent decision of the United States District Court for the Northern District of Illinois provides another example of the way courts view reparations based suits. After considering the claims brought by the descendants of enslaved Africans against corporations who supported enslavement and its legacy, the Court rendered a decision granting defendant corporation’s motion to dismiss.<sup>16</sup> In that case, plaintiffs’ claims against the corporations included conspiracy, conversion, and unjust enrichment for their role in the institution of slavery and its legacy in the United States.<sup>17</sup> After considering the allegations, the court offered the following conclusion:

It is beyond debate that slavery has caused tremendous suffering and ineliminable scars throughout our Nation’s history. No reasonable person can fail to recognize the malignant impact, in body and spirit, on the millions of human beings held as slaves in the United States. Neither can any reasonable person, however, fail to appreciate the massive, comprehensive, and dedicated undertaking of the free to liberate the enslaved and preserve the Union. Millions fought in our Civil War. Approximately six hundred and twenty thousand died . . . . The impact of this struggle on the

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Armed with machine guns, the white mob ravaged Greenwood, scattering machine gun fire indiscriminately at its African-American residents. During the night, the Governor called in the Oklahoma National Guard to restore order. The guardsmen, often acting in conjunction with the white mob, disarmed the African-American men who were defending their community and placed them in “protective custody.” Thus purged of any resistance, the white mob burned virtually every building in Greenwood. By 11:00 a.m. on the morning of June 1, 1921, when the Riot ended, forty-two square blocks of the Greenwood community lay in ashes.

382 F.3d at 1212.

<sup>14</sup> *Alexander I*, 2004 U.S. Dist. LEXIS 5131, at \*1.

<sup>15</sup> *Alexander II*, 382 F.3d at 1220.

<sup>16</sup> *African-American Slave Descendants Litigation*, 375 F. Supp 2d at 743–44.

<sup>17</sup> *Id.* at 721.

families of the wounded and the dead was immeasurable and lasting. The victorious and the vanquished together shared the cup of suffering . . . . The impact of this struggle on the Union as a whole was also significant. The enslavers in the United States who resisted or failed to end human chattel slavery sustained great personal and economic loss during and following the four years of the War. Generations of Americans were burdened with paying the social, political, and financial costs of this horrific War.<sup>18</sup>

These two cases and the judges' opinions reflect a view that each set of circumstances represented unfortunate events in American history, but not ones that the law could address. While the opinion in the Tulsa case seems much more sympathetic to the unique suffering of the Plaintiffs and their descendants, the result and effect of the decision offers no more to the victims of the Tulsa riot than that provided by the reparations case to the slave descendants. These opinions reflect the judicial attitude that black reparations advocates can almost certainly expect to encounter from the American judiciary when seeking redress for America's past racial injustices.<sup>19</sup>

Neither the American judiciary nor its legislatures has provided blacks with a consistent level of protection against, or remediation of, racial injustice.<sup>20</sup> In America, race law is never settled; it remains, instead, in constant flux dependant on the prevailing attitude of the majority.<sup>21</sup> This article contends that basing reparations on such an unstable and undependable legal system will likely produce undesirable and unsatisfactory results.

The article is divided into five parts. Part I considers some insights from moral philosophy to better explicate the goal of reparations. In using this approach, the article seeks to extend the discus-

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<sup>18</sup> *Id.* at 780.

<sup>19</sup> A legal regime fashioned by the United States Congress to provide reparations likewise offers little likelihood of an adequate reparations scheme but would be even more subject to the whims of the majority that over time have proved disappointing for black Americans. *See infra* Part I.

<sup>20</sup> *See infra* Part II (examining laws relating to blacks in particular from 1619 to 1963); *see also supra* note 8 (considering the dynamic nature of the last forty years of civil rights laws).

<sup>21</sup> *See generally* Ediberto Román, *Citizenship and the Dialectic of Membership and Exclusion* (Mar. 29, 2006) (unpublished manuscript, on file with author) for a broader discussion of the fluctuating status of racial minorities in the United States and its territories as well as a consideration of the racial component of domestic laws rooted in the war on terror.

sion beyond the confines of traditional legal argument to deepen the consideration of reparations' proper goal. This part then concludes by introducing arguments contesting the American legal system's ability to meet reparations' proffered goal. Part II discusses the foundations of the "Reign of Terror." Part III presents a survey of laws governing black life from 1619 to 1972. The survey examines federal, state, and colonial laws used to restrain blacks' educational, political, and economic rights and opportunities from their initial arrival to the civil rights era. The part also includes a brief consideration of civil rights laws passed from 1963 to 1972 and their efficacy for repairing the harms caused to black communities and individuals by the previous legal regime. Part IV assesses the proficiency of American laws to provide racial justice to blacks in light of Derrick Bell's theory of racial realism, Kimberle' Crenshaw's understanding of restrictive and expansive civil rights jurisprudence, and the political insights of Ralph Bunche. Drawing on the work of each of these figures, this part explores the future prospects of the American legal system to protect blacks from the excesses of America's non-black majority. In light of the insights gained from the analysis in Part IV, Part V looks to the work of Gary Peller in examining the theoretical roots of America's historical discourse about race-consciousness and its rejection as an approach to racial issues. Extending Peller's analysis, the part explores why race-consciousness constitutes an essential ingredient in pursuing the goals of a black reparations program.<sup>22</sup> Finally, the conclusion highlights some specific proposals for a black reparations program designed to remedy the educational, political, and economic harms visited upon black communities.

### I. REPARATIONS' GOALS AND LAW'S INSUFFICIENCY

Commentators tend to agree that the goal of black reparations is to repair something, despite considerable disagreement over what should be repaired and how.<sup>23</sup> This section considers the law's ability to make such repairs by briefly exploring the nature of the harms caused by slavery, the nature of the reparations needed to redress the harms, and the desirable goals of a reparations program. To guide the

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<sup>22</sup> This article only introduces the author's approach to the subject. See Carlton Waterhouse, *The Full Price of Freedom: African American Responsibility to Repair the Harms of Slavery and Segregation* (Apr. 3, 2006) (unpublished Ph.D. dissertation, Emory University) (on file with author) for an institution-based model of reparations.

<sup>23</sup> See *infra* notes 33, 34.



investigation, two concepts developed by moral philosopher Timothy Jackson relevant to reparations are explored, along with arguments made by abolitionists Benjamin Franklin and Wendell Phillips in antebellum America.

Jackson develops two concepts of moral philosophy that are relevant to black reparations: abomination and liberation.<sup>24</sup> He considers abomination from an anthropological perspective, supported by three dimensions of moral analysis: aretology, deontology, and teleology.<sup>25</sup> Using these three perspectives, Jackson gleans a fuller sense of abomination. He writes:

It is possible to interpret the "inhumanity" of abominations in terms of debilitating consequences . . . but when seen deontologically, being abominable is not the effect of improper actions but their cause, not an atavistic breakdown after immorality but a violation of the moral law. In fact, a deontological abomination is most distinctively a conscious rejection of the moral law itself and with it practical standards for human conduct. Finally, when seen aretologically the abominable is a mode of existence that is so intrinsically vicious as to undermine the normativity of any state of character. As extraordinary vice or brutality, the abominable subverts the very idea of personal integrity.<sup>26</sup>

Further, he maintains that certain limits precede and constrain any choices that are sensitive to the demands intrinsic to living with other people. In Jackson's view, "an abomination might be defined as what radically undercuts or transgresses those bounds (material and cultural) that have made and continue to make an ordered human existence possible."<sup>27</sup>

By these standards, the American system of chattel slavery was certainly an abomination. The system reduced enslaved Africans to a raw commodity without personhood.<sup>28</sup> All notions of human dignity were denied to the Africans in their transport and in their indoctrina-

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<sup>24</sup> See TIMOTHY JACKSON, *LOVE DISCONSOLED: MEDITATIONS ON CHRISTIAN CHARITY* 94 (1999).

<sup>25</sup> These dimensions of moral analysis, thought to originate in Greek philosophy, serve as fundamental axes underlying both contemporary and historic approaches to moral philosophy. *Id.* at 98. Aretology treats the character of moral actors; deontology focuses on the form of actions; and teleology addresses the consequences of actions. *Id.* at 98–99.

<sup>26</sup> *Id.* at 99–100.

<sup>27</sup> *Id.* at 94.

<sup>28</sup> *THE CLASSIC SLAVE NARRATIVES* 34 (Henry Louis Gates, Jr. ed., 1987).

tion to their new lives. In defining slavery in America, abolitionist David Barrow wrote:

When I use the word ‘*slave*’ or ‘*slaves*’, I would be understood to mean such *beings* of the *human race* who are (without any crime committed by them, more than is common to all men) with their offspring to perpetual generations, considered *legal property*; compelled by *superior force*, *unconditionally to obey* the *commands* of their *owners*, to be *bought and sold*, to be *given and received*, to *go and come*, to *marry or forbear*, to be *separated* when *married* at *pleasure*, to *eat, drink, sleep, wear, labor*, and to be beaten at their *owner’s discretion* . . . .<sup>29</sup>

The denial of human dignity, in fact, was one of the principle defining characteristics of the American system of slavery. Abolitionist author William Goodell explained how legal treatises of his day defined “ownership” of the enslaved.<sup>30</sup> He wrote, “[i]t is plain that the dominion of the master is as unlimited as that which is tolerated by the laws of any civilized country in relation to brute animals—to *quadrupeds*, to use the words of the civil law.”<sup>31</sup> Enslaved African women suffered special victimization caused by rape and forced sexual service as breeders of new property for the slave master.<sup>32</sup> This system of slavery constituted a total effacement of human dignity.

Abomination’s polar opposite—liberation or freedom—represents the other side of Jackson’s model and the focus of my analysis.<sup>33</sup> In his discussion, he elaborates on two distinct understandings of freedom. *Liberum arbitrium*, he notes, represents “freedom of choice” while *libertas* signifies a “more holistic notion of good disposition, candor, and personal integrity.”<sup>34</sup> He elaborates:

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<sup>29</sup> DWIGHT DUMOND, ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA 7 (1961) (citing DAVID BARROW, INVOLUNTARY, UNMERITED, PERPETUAL, ABSOLUTE, HEREDITARY SLAVERY, EXAMINED; ON THE PRINCIPLES OF NATURE, REASON, JUSTICE, POLICY, AND SCRIPTURE. at vi (1808)).

<sup>30</sup> See WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 27 (Negro Univ. Press 1968) (1853) (discussing the law governing the enslaved as well as “free” blacks).

<sup>31</sup> *Id.*

<sup>32</sup> DOROTHY SCHNEIDER & CARL SCHNEIDER, SLAVERY IN AMERICA: FROM COLONIAL TIMES TO THE CIVIL WAR 87–89 (2000).

<sup>33</sup> JACKSON, *supra* note 24, at 106.

<sup>34</sup> *Id.* at 105.

External, telic liberation is *from* something rather than *for* something. Such liberation is often a very great good, crucial for autonomous individuals as well as for democratic polities, but it clearly does not exhaust the meaning of the word and is not the most positive sense of liberty . . . . For if the end of oppression and the offer of aid [to those liberated] do not fundamentally empower . . . [them] to care for and about themselves . . . then it is at best incomplete and at worst paternalistic.<sup>35</sup>

In simple terms, *liberum arbitrium* suggests negative freedom—freedom from some external limiting force. *Libertas*, in contrast, connotes a positive freedom—freedom for human flourishing. In antebellum America, many opposing slavery embraced the liberation of enslaved blacks with the limited sense of *liberum arbitrium*. While thoroughly committed to emancipation, supporters of the colonization of enslaved blacks, like President Abraham Lincoln and Robert G. Harper, nonetheless lacked a commitment to enabling the newly freed to promote their full humanity by improving their moral, intellectual, and political condition.<sup>36</sup> General emancipation schemes, like specific acts of manumission that merely freed the enslaved with no support or aid, also represent *liberum arbitrium* by virtue of their failure to recognize and attend to the harms caused by a lifetime of bondage, or to take the steps necessary to enable the newly freed persons to flourish. Jackson points out the inadequacy of negative liberty alone, noting the necessity of positive conceptions of human well-being related to the development of human potential.<sup>37</sup> Only the writings of radical abolitionists envision emancipation consistent with *libertas* and the positive promotion of human flourishing.<sup>38</sup>

Although in the minority, Benjamin Franklin and Wendell Phillips offered two robust views of emancipation consistent with the notion of *libertas*. Benjamin Franklin, a former slave master who manumitted those he enslaved and joined the ranks of abolitionists, made the following remarks in a 1790 public address on the abolition of slavery:

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<sup>35</sup> *Id.* at 106.

<sup>36</sup> DUMOND, *supra* note 29, at 130. Robert G. Harper was one of the founders of the American Colonization Society.

<sup>37</sup> JACKSON, *supra* note 24, at 106.

<sup>38</sup> See DUMOND, *supra* note 29, at 16–25 (examining the varying views of emancipation held in antebellum America).

To instruct, to advise, to qualify those who have been restored to freedom, for the exercise and enjoyment of civil liberty; to promote in them habits of industry; to furnish them with employments suited to their age, sex, talents, and other circumstances; and to procure their children an education calculated for their future situation in life,—these are the great outlines of our annexed plan, which we have adopted, and which we conceive will essentially promote the public good, and the happiness of these our hitherto too much neglected fellow citizens.<sup>39</sup>

Franklin's remarks demonstrate a response to slavery that approaches the full liberation associated with *libertas*. His call for attention to the needs of the emancipated shows a motivation consistent with a fuller notion of liberation. Franklin's words display his intention to enable blacks to fully exercise and enjoy civil liberty.<sup>40</sup> He speaks directly to the educational, economic, and political development of the emancipated as a matter of obligation.<sup>41</sup> Jackson posits that "the most robust sense of 'liberation' involves internal empowerment, a revolution in the self rather than in the circumstances, a fundamental heightening of the capacity for personal care."<sup>42</sup> Franklin's remarks point to the personal development of the emancipated as a vital aspect of their liberation. He recognized that such development required nothing less than a personal investment from those promoting abolition.<sup>43</sup>

Unfortunately, by the 1870s many abolitionists lost sight of the robust liberation envisioned by Franklin and limited their agitation to the provision of negative freedoms (i.e., civil liberties) for blacks.<sup>44</sup> In a speech at the Republican Convention, Fredrick Douglass com-

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<sup>39</sup> *Id.* at 127.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> JACKSON, *supra* note 24, at 106. This internal revolution identified by Jackson does not exist in isolation but depends upon certain freedom from external constraints associated with *liberum arbitrium*.

<sup>43</sup> DUMOND, *supra* note 29, at 127.

<sup>44</sup> The efforts of the Freedman's Bureau and some missionary associations serve as the exception to the limited view of liberation embraced at the time. These organizations actively engaged in providing education and training for the newly emancipated. Although educational efforts continued in the spirit of full liberation, alone they were insufficient to meet the needs of the newly freed blacks as they failed to address the multitude of economic and other needs these blacks faced. Moreover, of the four million blacks living in the south, the bureau could only provide education to seventy-five thousand women, men, and children from 1865–1868—a remarkable achievement nonetheless. W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA 1860–1880*, at 648–67 (Free Press 1962).

mented, “[y]ou turned us loose to the sky, to the storm, to the whirlwind, and, worst of all, you turned us loose to the wrath of our infuriated masters.”<sup>45</sup> In the agricultural based society of the South, land was essential to meet the physical needs of individual families and entire communities. The principal skills of newly emancipated blacks rested firmly in agriculture.<sup>46</sup> The provision of land, originally endorsed by abolitionists, along with education and the right to vote, was the single aspect of the abolitionist plan that addressed blacks’ daily needs for survival.<sup>47</sup> The failure to make land available consigned “freedpeople” to dependency on their former enslavers.<sup>48</sup> This dependency stifled rather than fostered full liberation for blacks because it prevented them from providing basic care for themselves and others. The former enslavers routinely abused the relationships that developed with the freedman and other blacks by denying them the ability to buy land and by cheating them out of promised income. The Thirteenth, Fourteenth, and Fifteenth Amendments as well as the Civil Rights Acts of 1866 and 1875 came in the breach.<sup>49</sup> Unfortunately, these legal mechanisms offered blacks the hope of civil liberties without the means to enjoy them fully, as understood decades earlier by Benjamin Franklin in 1790.<sup>50</sup>

By the 1870s some abolitionists endorsed the idea that blacks needed to lift themselves up by their own bootstraps rather than receive additional assistance.<sup>51</sup> Wendell Phillips served as one of a few exceptions to the trend. He actively lobbied Congress to create a department to oversee land distribution, loans, and other services for the emancipated.<sup>52</sup> In response to the bootstrap argument, Phillips wrote:

This adult man, a husband and father, we have robbed him of wages for forty years. The ‘root, hog or die’ advice, to such a victim is the coolest [sic] impertinence . . . Every Negro

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<sup>45</sup> JOHN DAVID SMITH, *BLACK VOICES FROM RECONSTRUCTION: 1865–1877*, at 147 (1996).

<sup>46</sup> See BOOKER T. WASHINGTON, *UP FROM SLAVERY* 127 (Penguin Putnam 1986) (1901) (discussing emancipated blacks’ skills and opportunities to make a living following the War).

<sup>47</sup> JAMES MCPHERSON, *THE ABOLITIONIST LEGACY: FROM RECONSTRUCTION TO THE NAACP* 71–75 (1976).

<sup>48</sup> SMITH, *supra* note 45, at 147.

<sup>49</sup> See PHILIP RUBIO, *A HISTORY OF AFFIRMATIVE ACTION: 1619–2000*, at 34–35 (2001) (providing an in depth consideration of the Reconstruction Amendments and the federal civil rights legislation that accompanied them); see also ROY L. BROOKS, *ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS* 223 (2004).

<sup>50</sup> See *supra* text accompanying notes 39–43.

<sup>51</sup> See MCPHERSON, *supra* note 47, at 79.

<sup>52</sup> *Id.* at 78.

family can justly claim forty acres of land, one year's support, a furnished cottage, a mule and farm tools, and free schools for life.<sup>53</sup>

Phillips' comments offered a model of full liberation that robustly addressed the needs of those who suffered the abomination of slavery. Franklin and Phillips present understandings of liberation consistent with Jackson's conception of *libertas*. Their goal was to provide the emancipated with the educational, political, and economic resources necessary to enable them to exercise and enjoy their full humanity.

Unfortunately, American society not only rejected the vision of liberation offered by Franklin and Phillips, but returned to its practices of peonage, abuse, and the legal subordination of blacks.<sup>54</sup> The nation adopted the legal subordination of blacks as the prevailing response to the former centuries of enslavement.<sup>55</sup> This widely embraced system of legal subordination inflicted fresh injuries upon new generations of blacks for the next one hundred years, and placed the descendants of the enslaved and emancipated blacks in need of educational, political, and economic provisions that would enable them to fully exercise and enjoy their humanity.<sup>56</sup>

As established by Boris Bittker in *The Case for Black Reparations* and James Forman in *The Black Manifesto*, blacks need and have sought reparations for the harms America inflicted upon them beyond the civil rights legislation passed from 1964 to 1972.<sup>57</sup> *The Black Manifesto* does not differentiate the acts warranting reparations, stating simply, "[f]or centuries we have been forced to live as colonized people inside the United States, victimized by the most vicious racist system in the world. We have helped to build the most industrial country in the world."<sup>58</sup> It makes clear, nonetheless, that the legal claim for repara-

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<sup>53</sup> *Id.* Elsewhere Phillips writes, "[l]and should have been divided among the negroes, forty acres to each family, and tools—poor pay for the unpaid toil of six generations on that very soil. Mere emancipation without any compensation to the victim was pitiful atonement for ages of wrong." Wendell Phillips, *Views of an Old Abolitionist*, 128 N. AM. REV. 258, 260 (1879), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/ncps:@field\(docid+@lit\(abq7578-0128-27\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/ncps:@field(docid+@lit(abq7578-0128-27))).

<sup>54</sup> See *infra* Part III.A–B.

<sup>55</sup> See *infra* Part II.C.

<sup>56</sup> A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 77 (James Washington ed., 1990).

<sup>57</sup> See BORIS BITTKER, *THE CASE FOR BLACK REPARATIONS* 8–29 (2003); ARNOLD SCHUCHTER, *REPARATIONS: THE BLACK MANIFESTO AND ITS CHALLENGE TO WHITE AMERICA*, at ix–xx (1970); James Forman, *Black Manifesto* (1969), reprinted in BITTKER, *supra* at 167.

<sup>58</sup> Forman, *supra* note 57, at 167.

tions began centuries earlier and continues to the present. The National Black Political Convention likewise made a demand for reparations in 1972, rooted in "historic enslavement" and the "racist discrimination" inflicted upon blacks following the Civil War.<sup>59</sup> Bittker, in contrast, makes the case that the long years of segregation and subordination from the civil war to the civil rights movement alone warrants reparations for blacks.<sup>60</sup> In each example, the case is nonetheless clear that one hundred years after emancipation, blacks still sought the full liberation envisioned by Franklin and Phillips.

Today, despite the thirty year passage of time since the civil rights movement, the warrant and the need for reparations continue.<sup>61</sup> This article contends that the goal of reparations today correlates with the vision articulated by abolitionists like Franklin and Phillips. Reparations also correlate to Jackson's concept of *libertas*: providing blacks with the educational, political, and economic resources necessary to enable them to fully exercise and enjoy their civil liberties.

The issue of reparations for slavery in America continues to garner increasing attention in both academic and popular literature.<sup>62</sup> In the legal scholarship, a growing number of scholars and articles have contributed to the discourse around the issue by exploring the justice claims and the legal basis for reparations as well as the societal and psychological basis for reparations.<sup>63</sup> Despite significant contributions

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<sup>59</sup> BITTKER, *supra* note 57, at 79. The convention sought reparations in unspecified land, capital, and cash while the Manifesto sought specific endowments for the development of educational, economic, and financial institutions.

<sup>60</sup> *Id.* at 12-26.

<sup>61</sup> Blacks have collectively and individually improved their educational and economic standing since emancipation. Nonetheless, considerable wounds from enslavement and a century of segregation and subordination linger in black communities and families. See generally JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* (2000).

<sup>62</sup> Since 1998, more than thirty articles have been published on the subject, and four symposia have been held at the following schools: Boston University, Harvard University, Boston College, and New York University. See, e.g., Symposium, *Healing the Wounds of Slavery: Can Present Legal Remedies Cure Past Wrongs?*, 24 B.C. THIRD WORLD L.J. 1 (2004); Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. 1135 (2004); see also *infra* notes 59, 60, 85.

<sup>63</sup> See generally Roy Brooks, *Toward A Perpetrator-Focused Model of Slave Redress*, 6 AFR.-AM. L. & POL'Y REP. 49 (2004); Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003); Rhonda Magee, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Charles J. Ogletree, *Chapter 17 Addressing the Racial Divide: Reparations*, 20 HARV. BLACKLETTER L.J. 115 (2004); Natsu Taylor Saito, *Beyond Reparations: Accommodating Wrongs or Honoring Resis-*

from a wide range of scholars over the last twenty years, this article addresses a remaining deficiency in the literature and the discourse more broadly regarding the American legal system's ability to provide meaningful reparations to blacks for the harms of slavery and segregation.<sup>64</sup> In consideration of the issue, however, this article serves as one part of a larger normative project investigating reparations for slavery, segregation, and legal subordination.<sup>65</sup>

Despite the legitimate justification and the genuine need, the American legal system seems unable to accommodate the demand for reparations. The law's weakness in this regard results from two distinct causes. The first cause is fundamental and its full exploration rests beyond the scope of this article. It derives from the necessity that blacks must control and direct the reparative process that is required to redress the diverse harms outstanding from centuries of maltreatment.<sup>66</sup> This perspective contends that blacks play the primary role in orchestrating the repair of their communities and families rather than judges or legislators.<sup>67</sup> While this approach does not exclude legislative or judicial action as a vehicle to achieve some reparative ends, it does break with the notion that by presenting the "right case" blacks can "win" reparations or legislators can award reparations. Thus, this proposal differs with reparations models that place blacks in a passive role with reparations as something that the American judiciary or leg-

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tance?, 1 HASTINGS RACE & POVERTY L.J. 27 (2003); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477 (1998).

<sup>64</sup> See generally Art Alcausin Hall, *There Is a Lot to Be Repaired Before We Get to Reparations: A Critique of the Underlying Issues of Race That Impact the Fate of African American Reparations*, 2 SCHOLAR 1 (2000); Donald Aquinas Lancaster, Jr., *The Alchemy and Legacy of the United States of America's Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations*, 43 HOW. L.J. 171 (2000); Jeremy Levitt, *Black African Reparations: Making a Claim for Enslavement and Systematic De Jure Segregation and Racial Discrimination Under American and International Law*, 25 S.U. L. REV. 1 (1997); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003); Vincene Verdum, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. THIRD WORLD L.J. 429 (1998). The aforementioned authors along with a host of others have greatly advanced the dialogue on the subject.

<sup>65</sup> As a legal scholar trained as a social ethicist, it appears to me that many of the articles on this subject are arguments based in an implicit normative social theory addressing three hallmark axes of ethics: deontology, aretology, and consequentialism. While this article does not address the significance of the normative theory and claims underlying the existing literature, the analysis of the issue flows from an intentional application of normative social theory to the question. See generally Waterhouse, *supra* note 22.

<sup>66</sup> See *infra* text accompanying notes 364–65.

<sup>67</sup> See *infra* text accompanying notes 364–65.



islature will provide.<sup>68</sup> Efforts to redress past harms can actually be counter-productive, cruel, or insulting<sup>69</sup> when they are not accompanied by actions that attend to both the needs and agency of the injured group.<sup>70</sup>

Blacks will have to play a primary role in the creation, development, and implementation of a system that cements the sustained availability and use of economic, political, and cultural resources necessary to fully exercise and enjoy their civil liberties.<sup>71</sup> Entrusting responsibility for the creation of such a program to judges or legislators for legal instantiation seems unwise. Numerous examples of failed, inadequate, and demeaning redress and reparations programs inform this position. The U.S. treatment of Native American reparations claims under the Indian Claims Commission Act, Japan's handling of reparations for Korean comfort women during War World II, and German reparations for the gypsy victims of the Nazi regime all provide examples of how government-based reparations programs often frustrate, rather than fulfill, efforts to redress the wounds of past injustice.<sup>72</sup>

Blacks' experiences with law over 344 years of American history also demonstrate that the American legal system lacks the capacity to provide reparations.<sup>73</sup> Rather than a means of securing or providing

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<sup>68</sup> The popular model for reparations often places past victims in the single role as claimant. To achieve the goal of reparations articulated above, however, blacks today will have to construct a reparative model that addresses the individual and communal harms inflicted. Simple claim based systems lack that capacity. Like an injured person recovering from trauma, blacks must play an active role in their own recovery. The passive receipt of money without a plan for regaining lost or impeded abilities would fall short of true reparation.

<sup>69</sup> Redress or reparations provided to the several tribes of North America have often been inadequate and even offensive. See Nell Jessup Newton, *Compensation, Reparations, and Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 454 (1994) (assessing past redress for Native Americans).

<sup>70</sup> Agency, here, refers to the active role or instrumentality of the group or its members in the reparative process. In contrast with the legal notion of agency that focuses on actions undertaken on another's behalf, agency in this sense necessarily includes actions carried out on one's own behalf.

<sup>71</sup> Despite the advancements experienced by blacks from the 1940s to the 1970s and to a lesser extent from the 1970s to the present, blacks individually and collectively experience the cost of past discrimination in their political, educational, and economic resources. See FEAGIN, *supra* note 61, at 24-27, 186-90. That cost ranges from the vast disparities in wealth between blacks and whites at comparable income levels to the dearth of blacks with doctoral degrees and the absence of blacks in statewide elected offices. See *id.* Black overrepresentation in unemployment, high school drop-out rates, infant mortality, incarceration, and poverty likewise reflect America's discriminatory past. See *id.*

<sup>72</sup> See WHEN SORRY ISN'T ENOUGH, *supra* note 11, at 8-11 (examining national and international reparations and their limitations).

<sup>73</sup> See *infra* Part III.

justice, the American legal system served as a primary element in the enslavement, segregation, and forced subordination of blacks through most of American history.<sup>74</sup> This historic phenomenon did not derive from jurisprudential necessity, but resulted instead from the racialized nature of the legal system as means of securing majoritarian preferences. Derrick Bell's theory of racial realism, the political insights of Ralph Bunche, and blacks' experiences under law from 1619 to 1972 guide this analysis and support this position.<sup>75</sup>

Today, the legal system continues to reflect the preferences of the society's white majority.<sup>76</sup> Both judges and legislators act with full awareness that the successful implementation of their decisions and enactments require the majority's support.<sup>77</sup> Notwithstanding *Brown v. Board of Education's* success as the death knell of de jure segregation, the Supreme Court's early and continued failure to achieve integrated education flowed directly from the white majority's refusal to support the decision.<sup>78</sup> Accordingly, any legally-based program for reparations will require the support of America's white majority; however, no such support is likely to be forthcoming for a reparative program that meets the goals articulated above.<sup>79</sup> The idea of benefiting blacks in a way that offers no apparent benefit to whites has never enjoyed popular support in America.<sup>80</sup> The Reconstruction Congress came closest to this goal in drafting legislation for creating the Freedman's Bureau as an agency to assist emancipated blacks.<sup>81</sup> The Congress ultimately rejected that legislation, however, on the basis that it improperly favored blacks and adopted legislation that attended to the needs of

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<sup>74</sup> See *infra* Part III.

<sup>75</sup> See BLACK PROTEST THOUGHT IN THE TWENTIETH CENTURY 183–202 (August Meier et al. eds., 1971) [hereinafter BLACK PROTEST THOUGHT]; see also Derrick Bell, *Racism Is Here to Stay: Now What?*, 35 How. L.J. 79, 79 (1991).

<sup>76</sup> This underscores the implicit danger democracy poses to minority groups. For a discussion of the relationship between minority rights and the perceived interest of the white majority, see Bell, *supra* note 6, at 530.

<sup>77</sup> See KLARMAN, *supra* note 6, at 5–7 (discussing judicial decisions' relationship to broader societal views); see also BLACK PROTEST THOUGHT, *supra* note 75, at 196–202. Legislators are of course charged with representing their constituents and ignore such views at their own political peril.

<sup>78</sup> KLARMAN, *supra* note 6, at 398–421; see *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495–96 (1954). Consider the massive resistance to *Brown* and its progeny.

<sup>79</sup> See Robert A. Sedler, *Claims for Reparations for Racism Undermine the Struggle for Equality*, 3 J.L. Soc'y 119, 119–24 (2002) (discussing the limited circumstances under which whites support race-based programs to aide blacks and their sure rejection of reparations claims today).

<sup>80</sup> See *id.*

<sup>81</sup> See RUBIO, *supra* note 49, at 46–49.

white refugees as well.<sup>82</sup> As polling on the question of reparations shows, whites today are still not interested in providing benefits exclusively to blacks because of the perceived unfair racial advantage it provides.<sup>83</sup> Accordingly, reparations advocates who share the reparations goal adopted by this article need to explain their confidence that the American judiciary or the United States Congress can construct a viable reparations program.<sup>84</sup>

Rather than warning against the likely shortcomings of a legally based reparations program, most of the existing scholarship argues the merits of reparations as a matter of law or social philosophy.<sup>85</sup> Scholarship supporting reparations for blacks in America turns on three main

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<sup>82</sup> *Id.* (discussing contemporary court protection over the "rights of whites"); see also Linda S. Greene, *Race in the 21st Century: Equality Through Law?*, 64 TUL. L. REV. 1515, 1517 (1990).

<sup>83</sup> See Sedler, *supra* note 79, at 120–24. On the question of reparations, polls indicate that eighty percent of whites oppose reparations of any sort while blacks support the government payment of reparations at around the sixty-seven percent level. Courtland Milloy, *Cash Alone Can Never Right Slavery's Wrongs*, WASH. POST, Aug. 18, 2002, at C01. Consider also society's rejection of affirmative action as a remedial program for generalizable past discrimination on the basis that it provides an unfair advantage to blacks and others. RUBIO, *supra* note 49, at 164–65.

<sup>84</sup> Commentators pursuing reparations as a means to attain racial reconciliation or improved social welfare programs may still hold confidence in the law's ability to achieve such ends. This article contends, however, that neither of these meets a fundamental requirement that reparations repair some substantive harm inflicted upon blacks. Reparation has two primary meanings in its derivation from late Middle English and its common origin with repair from the Latin *reparare*. SHORTER OXFORD ENGLISH DICTIONARY 2533 (5th ed. 2002). The first meaning is restoration or renewal, and the second is making amends or providing compensation for a wrong committed. *Id.* The concept represented by the second set of meanings—to make amends—of both repair and reparations exemplifies the dominant and popular notion of reparations in discourse and the literature. It also rests at the heart of the ambiguity of the proper goal of reparations. This article maintains that goals of reparations rooted in broader social policy objectives, rather than remediation, run the risk of using the past suffering of blacks as a means to an end. These approaches advance laudable goals for American society, but these are not reparations for slavery and segregation as much as broader social policy objectives rooted in a normative social theory of substantive equality. Clearly, most of these goals would be viable for American society even if the trans-Atlantic slave trade or Jim Crow segregation had never occurred.

<sup>85</sup> Even though the position adopted in this article questions the level of confidence that many commentators have in the legal system to provide and sustain meaningful reparations, it endorses the substantial development of arguments by commentators establishing the legal and moral warrants for reparations. Those bringing reparations claims and promoting reparations legislation have, likewise, made a vital contribution to this important subject. See generally Troy Duster, *Repairing the National Memory by Acknowledging the Living Presence of 'Our Childhood Locked in the Closet'*, 6 AFR.-AM. L. & POL'Y REP. 43 (2004) (examining attendant benefits of bringing reparations claims); Emma Coleman Jordan, *The Non-Monetary Value of Reparations Rhetoric*, 6 AFR.-AM. L. & POL'Y REP. 21 (2004).

axes: perspective, methodology, and goals.<sup>86</sup> Perspective describes the approach endorsed as either prospective or retrospective. Methodology represents the means preferred as either adjudicatory or legislative/political. Goals articulate the principal end sought as social conciliation, victim remediation, or societal transformation.<sup>87</sup> Most of the legal literature on black reparations classifies as prospective, adjudicatory, and remedial/transformational.<sup>88</sup> These articles seek to show that black reparations are consistent with various causes of action or legal theories, would promote racial justice, and/or further broader societal goals such as eliminating poverty, decreasing unfair incarceration, and promoting education.<sup>89</sup> Another segment of the literature can be classified as prospective, legislative, and conciliatory. These writings conceptualize reparations as a meaningful step toward healing deep racial wounds caused by slavery and its legacy.<sup>90</sup> The bulk of the remaining literature is an assortment of reflections based on comparative and international

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<sup>86</sup> A much smaller segment of literature rejects a traditional notion of reparations for African Americans. Most of it does so based on one or more of the following: the absence of victims and perpetrators, the need to move forward on racial issues, lack of political support, and the dictates of judicial economy. See generally Duster, *supra* note 85; Ryan Fortson, *Correcting the Harms of Slavery: Collective Liability, the Limited Prospects of Success for a Class Action Suit for Slavery Reparations, and the Reconceptualization of White Racial Identity*, 6 AFR.-AM. L. & POL'Y REP. 71 (2004); Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S.U. L. REV. 25 (2001); Jordan, *supra* note 85; Van B. Luong, *Political Interest Convergence: African American Reparations and the Image of American Democracy*, 25 U. HAW. L. REV. 253 (2002); Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615 (2003); Randall Robinson, *What America Owes to Blacks and What Blacks Owe to Each Other*, 6 AFR.-AM. L. & POL'Y REP. 1 (2004).

<sup>87</sup> See Brophy, *supra* note 63, at 530–31 (advocating a more deliberate consideration of goals and highlighting the conceptual and legal problems with reparations). Brophy draws attention to the insufficiency of the general conception of reparations while advocating for a less race specific reparative remedy. See *id.* at 509.

<sup>88</sup> See *infra* note 89.

<sup>89</sup> See generally James R. Hackney, Jr., *Ideological Conflict, African American Reparations, Tort Causation and the Case for Social Welfare Transformation*, 84 B.U. L. REV. 1193 (2004); Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531 (2001); Anthony Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651 (2003); Robert Westley, *Foreword: Bridging the Public/Private Law Divide in African-American Reparations Discourse*, 55 RUTGERS L. REV. 301 (2003); Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269 (2003).

<sup>90</sup> See generally Mishael A. Danielson & Alexis Pimentel, *Give Them Their Due: An African-American Reparations Program Based on the Native American Federal Aid Model*, 10 WASH. & LEE RACE & ETHNIC ANC. L.J. 89 (2004); Eva Jefferson Paterson, *And Still We Rise*, 6 AFR.-AM. L. & POL'Y REP. 15 (2004); Alfreda Robinson, *Troubling "Settled" Waters: The Opportunity and Peril of African-American Reparations*, 24 B.C. THIRD WORLD L.J. 139 (2004).

law, political philosophy, and traditional civil rights scholarship.<sup>91</sup> In order to assess the legal system's capability to provide reparations for blacks, assumed within most of the foregoing literature, this article now turns to a brief review of black life under law from 1619–1972.

## II. THE FOUNDATIONS OF THE REIGN OF TERROR

From the early seventeenth century to the mid-twentieth century, American law served as a frequent adversary and only an occasional ally of African Americans.<sup>92</sup> Across the American landscape during this time period, racially biased laws instantiated white supremacy and black subordination.<sup>93</sup>

The racialization of slavery as a perpetual legal status for blacks and their descendants in the early colonial period represents a major milestone in the legal subordination of black people.<sup>94</sup> Examination of the early development of Virginia law shows that the twenty “negers” that arrived in Virginia in 1619 experienced a form of servitude similar to that of their white and Indian counterparts.<sup>95</sup> By the mid-1600s, however, the law began to recognize a new category of laborer: blacks in perpetual servitude.<sup>96</sup> Early deeds conveyed black women and their issue to whites for their “lifetime and their successors forever.”<sup>97</sup> These conveyances, along with a 1640 legal decision mandating a punishment of three additional years of service for two white runaway servants, but a lifetime of service for their black accomplice, marked the beginning of a new status for blacks.<sup>98</sup>

The introduction of this new status for these and other blacks in the Virginia colony represents a legal milestone in what this article identifies as the “Reign of Terror.” Formerly, white and black servants, with or without indenture, were protected by law from various forms

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<sup>91</sup> See generally Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457 (2003); Joe R. Feagin, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are in Order for African Americans*, 20 HARV. BLACKLETTER L.J. 49 (2004); Jordan, *supra* note 85; Edith Y. Wu, *Reparations to African-Americans: The Only Remedy for the U.S. Government's Failure to Enforce the 13th, 14th, and 15th Amendments*, 3 CONN. PUB. INT. L.J. 403 (2004).

<sup>92</sup> See *infra* Part III.A–B.

<sup>93</sup> See *infra* Part III.A–B.

<sup>94</sup> See HIGGINBOTHAM, *supra* note 5, at 26–28.

<sup>95</sup> WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARDS THE NEGRO, 1550–1812*, at 73–74 (1968); HIGGINBOTHAM, *supra* note 5, at 20.

<sup>96</sup> See HIGGINBOTHAM, *supra* note 5, at 26–28.

<sup>97</sup> *Id.* at 26.

<sup>98</sup> *Id.*

of abuse, including mistreatment during their term of service, a denial of payments upon their discharge, and felonious harm.<sup>99</sup> The legislature removed these legal protections from blacks in Virginia, however, by enacting a statute acquitting slave masters for criminal charges for killing enslaved blacks while inflicting punishment.<sup>100</sup> Virginia's later legislation in 1680 became the model for black subordination throughout the nation.<sup>101</sup> It forbade enslaved and "free" blacks from bearing arms of any type, required a certification from masters for enslaved blacks to leave their masters' plantations, prohibited enslaved and "free" blacks from defending themselves against whites, and sanctioned the killing of runaway blacks who resisted apprehension.<sup>102</sup> In 1691, the Virginia legislature further illustrated the significance of the new status of blacks through legislation that seriously discouraged some and prevented other slave masters from the manumission or release of enslaved blacks.<sup>103</sup> The act established that "no Negroes or mulattoes be set free by any person whatsoever, unless such person pay for the transportation of such Negro out of the country within six months . . . ."<sup>104</sup> The statute imposed a ten pound penalty upon offending slave masters for violating its provisions.<sup>105</sup> Blacks freed in violation of the statute were to be seized and re-enslaved.<sup>106</sup> Within two decades, the Virginia legislature had foreclosed manumission for almost all enslaved blacks in the colony.<sup>107</sup> Under the new statute, the governor and the legislature reserved the few manumissions offered as a reward for blacks performing some "public service."<sup>108</sup>

From the passage of the aforementioned legislation of 1680 on, pernicious laws covered almost all aspects of life for both the enslaved

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<sup>99</sup> An Act Concerning Servants and Slaves, Chapter XLIX, in 3 WILLIAM WALLER HENING, *THE STATUTES AT LARGE*, at 447–48 (Oct. 1705) (providing a compilation of all the laws of Virginia from the first session of the legislature in the year 1619), available at <http://www.vagenweb.org/hening/vol03-25.htm>.

<sup>100</sup> An Act about the Casual Killing of Slaves, Act I (Oct. 1669), in 2 HENING, *supra* note 95, at 270–71, available at <http://www.vagenweb.org/hening/vol02-13.htm>.

<sup>101</sup> An Act Preventing Negroes Insurrection, Act X (June 1680), in 2 HENING, *supra* note 95, at 481–82, available at <http://www.vagenweb.org/hening/vol02-23.htm>.

<sup>102</sup> *Id.*

<sup>103</sup> An Act for Suppressing Outlying Slaves, Act XVI (Apr. 1691), in 3 HENING, *supra* note 95, at 86–88, available at <http://www.vagenweb.org/hening/vol03-06.htm> [hereinafter An Act for Suppressing Outlying Slaves].

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> An Act for Suppressing Outlying Slaves, *supra* note 103, at 86–88.

and the free black throughout America.<sup>109</sup> South Carolina, the first colony with a black population exceeding that of whites, surpassed the harshness of Virginia laws with a statute passed in 1712.<sup>110</sup> Of particular note were the penalties imposed for slaves who ran away or were in some way involved with supporting or encouraging escape attempts by others.<sup>111</sup> To ensure that masters inflicted the prescribed penalties, the statute subjected them to both fines and forfeiture of their slaves if they failed to carry out the prescribed punishment.<sup>112</sup>

"Free" blacks also suffered increasing erosion of their liberties as the rice economy grew in states such as South Carolina and the restrictions on enslaved blacks multiplied.<sup>113</sup> A statute in 1740 highlighted the precarious status of "free" blacks by removing cases involving them from the regular courts to the slave court system under which the unsworn testimony of enslaved blacks and Indians could be offered against them.<sup>114</sup> Moreover, the statute subjected "free" blacks to a fine for "harboring slaves" and to the severe punishment of being sold at public auction upon non-payment of the fine.<sup>115</sup>

The legal proscriptions, limitations, and restrictions established during this period reflected the social boundaries of black life that blacks, as well as whites, were bound to recognize. Black subordination was not merely a reflection of white personal preference, but rather a socially mandated reality that ordered the punishment of whites and blacks who disregarded its dictates.<sup>116</sup> Although many northern states

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<sup>109</sup> The law of slavery addressed all aspects of the enslaved's life—health, freedom, marriage, children, market value, and punishment. *See generally* HIGGINBOTHAM, *supra* note 5. Although "free" blacks enjoyed more freedom than their enslaved counterparts, laws were likewise established regarding them in order to concretize the social order of white supremacy and black subordination. *Id.* at 203–09.

<sup>110</sup> *Id.* at 169–87.

<sup>111</sup> *See id.* at 176–77. Under the statute, persons encouraging escape were whipped and branded. *See id.* Those leaving the plantation without the intent to escape bondage were subject to forty lashes, branding on the right cheek, removal of an ear, castration and other punishment depending upon the number of previous offenses. *See id.* at 176–78. Blacks who ran away to escape slavery but were captured were punished by death, as were those who merely attempted to run away with the intent of gaining their freedom. *See id.* at 176–77.

<sup>112</sup> *See id.* at 177.

<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See* HIGGINBOTHAM, *supra* note 5, at 205.

<sup>116</sup> This is evident in colonial South Carolina's restriction on manumission and the established penalties for anyone who afforded enslaved blacks humane treatment. THE STATUTES AT LARGE OF SOUTH CAROLINA, 1836–1841, at 177 (Thomas Cooper & David J. McCord eds.), *cited in* HIGGINBOTHAM, *supra* note 5, at 169–87. The South Carolina law typifies the racial laws of the period by providing for the punishment of whites as well as

passed anti-slavery legislation during other times, most of the states also maintained race-specific restrictions on their “free” black populations until one of the two periods cited above.<sup>117</sup>

### III. AMERICAN LEGAL HISTORY AND RACIAL SUBORDINATION: BLACK LIFE FROM 1619-1972<sup>118</sup>

This section reviews the harmful constraints that racially biased laws placed on blacks from 1619 to 1963 during the “Reign of Terror.”<sup>119</sup> The survey is separated into an examination of laws governing enslaved and “free” blacks across the three centuries. Rather than providing a litany of the wide ranging laws directed to the black population, it concentrates on laws governing three aspects of black life: education and political rights, and economic freedoms. The foregoing areas provide insight into three fundamental aspects of African Americans’ ability to participate individually and collectively in American society.

The review then addresses the legislation and legal decisions extending formerly denied civil liberties to blacks. This period is designated as the “Reign of Rights.” The purpose in organizing the review in this way is to highlight the divergent and paradoxical uses of law regarding African Americans. Law originally mandated the mistreatment of enslaved and “free” blacks, until its recent use to proscribe the very treatment formerly required.<sup>120</sup> This article likens the laws designed to

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blacks who ran afoul of the mandated subjugation of both “free” and enslaved blacks. *Id.* at 352. Additional examples of this are provided in the discussion below of economic and educational laws in antebellum America.

<sup>117</sup> GOODELL, *supra* note 30, at 356–57.

<sup>118</sup> The following survey narrowly focuses upon restrictive laws placed on enslaved and “free” blacks. Laws governing the treatment of other racial groups were also prevalent during this time and were frequently in the same statutes. This survey, however, limits its consideration to the law’s impact upon blacks.

<sup>119</sup> Here, the term “Reign of Terror” describes the legally prescribed educational, political, and economic subordination of blacks. Scholars have traced the origins of the term “Reign of Terror” to the French Revolution’s bloodiest phase (1793–94), in which “terrorism” was defined as “state-sponsored violence by the party in control of the government” and then used to consolidate power through intimidation. James Pfander, *Charles Was First*, LEGAL AFFAIRS, May-June 2004, at 20, 20. The laws during the “Reign of Terror” referred to in this article functioned to maintain the subordinate status of blacks by authorizing police and private citizens to designate blacks who violated these laws as lawbreakers.

<sup>120</sup> These distinctions represent the predominant uses of law during the periods examined. As the survey below illustrates, in some cases jurisdictions awarded black Americans rights only to curtail, eviscerate, or eliminate them at some point in the future. *See infra* note 202 and accompanying text. The “Reign of Rights,” therefore, represents the most stable provision of rights afforded blacks in the past four hundred years, despite the sub-



subordinate blacks during the “Reign of Terror” to the knife thrust nine inches into a person’s back in Malcolm X’s metaphor. The civil rights laws developed during the “Reign of Rights,” represent the removal of the knife from the back of African American communities. Paradoxically, removing the knife completely from a stabbed person’s back can further the injury, unless the wound it created is treated. To wit, without treatment the person may bleed to death. Accordingly, this article contends that the civil rights laws during the “Reign of Rights” have been implemented in a way that obscures the necessity of repairing the harms inflicted during the “Reign of Terror.” Thus the “Reign of Rights” has caused its own harm—much like removing a knife without attending to the wound. Reparations, therefore, represent the intentional treatment of the wound caused by the “Reign of Terror.”

### A. *Laws Governing Enslaved Blacks*

#### 1. Education

Generally, laws prohibited enslaved Africans from being educated.<sup>121</sup> Although the laws governing slavery varied from place to place, certain general prohibitions held across the states and colonies; education was one activity that was consistently prohibited.<sup>122</sup> Kentucky and Maryland were the only two states that allowed slavery without prohibitions against the education of enslaved blacks.<sup>123</sup> The remaining states generally prohibited anyone from teaching enslaved blacks to read or write.<sup>124</sup> Punishment for violating these laws ranged from as many as twenty lashes to a five hundred dollar fine or an entire year in jail.<sup>125</sup>

#### 2. Political Rights

Although the American colonies exercised considerable political autonomy, the right to participate in self-governance was never extended to enslaved blacks. Charters in Maryland, Pennsylvania, North Carolina, South Carolina, and New Jersey all specified the enactment

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sequent evisceration of a number of those legal rights by the United States Supreme Court from 1978 to the present. *See infra* Part III.C.

<sup>121</sup> GOODELL, *supra* note 30, at 319–25.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 323–24.

<sup>124</sup> *Id.* at 319–25.

<sup>125</sup> *Id.* at 319, 321.

of legislation only with “consent of the freemen.”<sup>126</sup> In the original colonies and the states later joining the union, the law uniformly excluded enslaved Africans from participation in governance.<sup>127</sup> This exclusion barred their involvement in choosing representation, holding office, and voting on political decisions.<sup>128</sup> Furthermore, discussing abolition or other matters tending to produce discontent with the enslaved was a high crime in some states resulting in imprisonment or possibly death.<sup>129</sup>

### 3. Economic Freedoms

Enslaved Africans had no legal rights to property—real or otherwise.<sup>130</sup> As property themselves, in most places whatever goods the enslaved claimed as their own could be taken to the justice of the peace by any white person, who was then entitled to half of its value with the remainder going to the court or the state.<sup>131</sup> Laws also regularly denied the enslaved both ownership of livestock and land that they could harvest for sale, although Louisiana allowed slaves to cultivate land for their own food.<sup>132</sup> Louisiana followed Roman law (*peculium*), which allowed slaves to keep a portion the “property” allotted to them by their masters.<sup>133</sup> Besides that limited portion, Louisiana law conformed to other states’ laws establishing that the master owned all the possessions of enslaved blacks.<sup>134</sup> State laws also prohibited the enslaved from obtaining real or personal property by means of a gift or through the provisions of a will.<sup>135</sup> Furthermore, the enslaved were also restricted from transferring property through either of these means.<sup>136</sup>

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<sup>126</sup> See HIGGINBOTHAM, *supra* note 5, at 114 (examining rights enjoyed in these early colonies). Colonists in Massachusetts established the Mayflower compact and only two colonies did not include self-governance provisions in their formation: New York and Georgia. *Id.* at 114, 218–20.

<sup>127</sup> *Id.* at 218–20.

<sup>128</sup> *Id.* In the original colonies, disenfranchisement was not limited to enslaved blacks—Indians, women, and anyone without property was also disenfranchised. See generally HIGGINBOTHAM, *supra* note 5. The enslaved uniquely counted as 3/5 of a person for purposes of representation, however, under the Constitution. U.S. CONST. art. I, § 2, cl. 3.

<sup>129</sup> See GOODELL, *supra* note 30, at 322–23.

<sup>130</sup> See *id.* at 89.

<sup>131</sup> *Id.* at 90–92.

<sup>132</sup> *Id.* at 135.

<sup>133</sup> *Id.* at 90–92.

<sup>134</sup> *Id.* at 90.

<sup>135</sup> GOODELL, *supra* note 30, at 90–92.

<sup>136</sup> *Id.* at 90.

With few exceptions, the enslaved had limited means to improve their material condition despite industry and thrift.<sup>137</sup> In Georgia, the 1750 slave law prohibited slave masters from allowing the enslaved to be apprenticed to a craftsman or from being lent out to perform any work other than crop cultivation.<sup>138</sup> The enslaved could not enter into contracts except on behalf of a master and, as a rule, others could not hire them out for their own benefit.<sup>139</sup> Masters allowing enslaved blacks to hire themselves out, as well those who hired them, were subject to substantial fines.<sup>140</sup> The law also denied the enslaved the ability to purchase anything for themselves or sell anything for their own benefit.<sup>141</sup> As with hiring enslaved blacks, “trucking or trading” with the enslaved for their own benefit was an offense punishable by fine.<sup>142</sup> Accordingly, by proscribing the enslaved from lawfully obtaining property or exercising ownership rights such as transferring property to their children or loved ones, the law barred the enslaved from creating or gaining wealth individually or collectively regardless of their frugality or industry.<sup>143</sup>

### B. *Pre-Civil War and Post-Civil War Laws Governing Free Blacks*

Heavy legal constraints existed upon “free” blacks<sup>144</sup> in America from the seventeenth to the twentieth century.<sup>145</sup> All of the original colonies and the states passed extensive legislation concerning and limiting the “free” blacks both before and after the Civil War.<sup>146</sup> Through

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<sup>137</sup> See *id.* at 97–99.

<sup>138</sup> HIGGINBOTHAM, *supra* note 5, at 251.

<sup>139</sup> GOODELL, *supra* note 30, at 97–99.

<sup>140</sup> *Id.* at 98–99.

<sup>141</sup> *Id.* at 89.

<sup>142</sup> *Id.* at 97–100.

<sup>143</sup> Despite the legal prohibitions against gaining personal property, enslaved blacks with willing slave masters could occasionally use cunning and thrift to buy freedom for themselves and others. IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 275 (1998).

<sup>144</sup> In 1790, there were an estimated 59,557 “free” blacks—relative to 697,624 enslaved blacks and a total of 757,181 blacks across the newly formed nation. BUREAU OF THE U.S. CENSUS, U.S. DEPT. OF COMMERCE, *NEGRO POPULATION IN THE UNITED STATES, 1790-1915*, at C3.2:N31 (1968). The number of “free” blacks had increased to 108,435 by 1800, as the number of enslaved blacks had grown to 893,602. *Id.*

<sup>145</sup> Before undertaking this study, the author thought that “free” blacks enjoyed greater equality under the law before the Jim Crow era.

<sup>146</sup> See HIGGINBOTHAM, *supra* note 5, at 100–38 (discussing the life of “free” blacks during the colonial period). See generally JOHN HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* 1 (Negro Univ. Press 1968) (1862) for consideration of legislation governing enslaved and “free” black in the colonial and later periods.

law, states and colonies designated “free” blacks as a subordinate class without the fundamental rights and privileges afforded whites.<sup>147</sup>

Of the multiplicity of race-based constraints before the Civil War, two rested at the foundation of the “free” blacks relationship to the law: the inability to testify against a white person in a court of law and the threat of enslavement or re-enslavement.<sup>148</sup> The restriction against testifying against whites barred “free” blacks from basic legal protections—they were without legal recourse to protect their property, their liberty, or their families without a white benefactor who would testify on their behalf.<sup>149</sup> Thus, “free” blacks without white employers or respected white friends lived at great peril, and with little recourse to the law for protection.

The constant threat of enslavement served to dissuade “free” blacks from entertaining notions of legal equality.<sup>150</sup> Under federal, state, and colonial law, “free” blacks were subject to enslavement for the first time or re-enslavement based on a wide variety of circumstances.<sup>151</sup> This penalty was common in the laws governing residency and travel.<sup>152</sup> Slaveholding states regularly required freed blacks to leave the state or else be sold back into slavery, or prohibited the immigration of “free” blacks into the jurisdiction.<sup>153</sup> Other states forbade travel by “free” blacks out of the state and mandated their sale into slavery should they return.<sup>154</sup> Georgia, Maryland and other states prohibited “free” blacks from coming to the state upon penalty of being sold into slavery.<sup>155</sup> Some states forbade free black sailors from disembarking in their states, or “quarantined” ships that employed black sailors.<sup>156</sup> Moreover, “free” blacks were regularly subject to the designs of enslavers and slave catchers seeking to place them in, or return them to, a state of perpetual bondage.<sup>157</sup> In the Northwest Territory, “free” blacks were required

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<sup>147</sup> The extensive restraints governed almost all aspects of life. See GOODELL, *supra* note 30, at 355–57.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 357.

<sup>150</sup> See *id.* at 355–56.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 355, 360–61.

<sup>153</sup> GOODELL, *supra* note 30, at 355–56.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 363.

<sup>157</sup> See *id.* at 355.

to bring a sizeable financial bond, a certificate of freedom, and other written documents to take residence there.<sup>158</sup>

Following the Civil War, the status of the "freedmen" approximated in many respects the tenuous subordinate position held by "free" blacks in antebellum America.<sup>159</sup> As a general matter, southern whites still regarded the masses of blacks as inherent inferiors subordinate to them and their interests.<sup>160</sup> In reporting to President Andrew Johnson, after a tour of the South in 1865, former Union General Carl Schurz wrote:

Wherever I go—the street, the shop, the house, the hotel, or the steamboat—I hear the people talk in such a way as to indicate that they are yet unable to conceive of the Negro as possessing any rights at all. Men who are honorable in their dealings with their white neighborhoods, will cheat a Negro without feeling a single twinge of their honor. To kill a Negro, they do not deem murder; to debauch a Negro woman, they do not think fornication; to take the property away from a Negro, they do not consider robbery.<sup>161</sup>

As evidenced in the Supreme Court's decision striking down the Civil Rights Act of 1875, the idea that blacks continued to lack the legal rights and privileges enjoyed by whites in post-Civil War America

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<sup>158</sup> See STEPHEN MIDDLETON, *THE BLACK LAWS IN THE OLD NORTHWEST: A DOCUMENTARY HISTORY* 15–18, 199–205, 291–307, 346 (1993) (discussing restrictions in Ohio, Michigan, Illinois, and Indiana).

<sup>159</sup> DuBois, *supra* note 44, at 139. Elaborating on this situation DuBois writes, "[t]he Negro's access to the land was hindered and limited; his right to work was curtailed; his right of self-defense was taken away, when his right to bear arms was stopped; and his employment was reduced to contract labor with penal servitude as a punishment for leaving his job." *Id.* at 167. The following quote from a committee of the Florida legislature in 1865 helps illustrate the point:

But it will hardly be seriously challenged that the simple act of emancipation of itself worked any change in the social, legal or political status of such of the African race as were already free. Nor will it be insisted, we presume, that the emancipated slave technically denominated a "freedman" occupied any higher position in the scale of rights and privileges than did the "free Negro." If these inferences be correct, then it results as a logical conclusion, that all the arguments going to sustain the authority of the General Assembly to discriminate in the case of "free Negroes" equally apply to that of "freedmen," or emancipated slaves.

*Id.* at 139.

<sup>160</sup> *Id.* at 136–37.

<sup>161</sup> *Id.* at 136.

was in no way limited to southerners.<sup>162</sup> Writing for the majority, in the *Civil Rights Cases*, Justice Bradley offered the following:

There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought it was any invasion of their personal *status* as freemen because they were not admitted to all the privileges enjoyed by white citizens . . . .<sup>163</sup>

The majority's revisionist claims regarding "free" blacks' equal enjoyment of "the essential rights, of life, liberty, and property" before the Civil War clearly ignores the degraded liberty and property rights provided "free" blacks.<sup>164</sup> Moreover, as Justice Harlan points out in his lone dissent, the majority's claims ignore the Court's landmark decision in *Dred Scott v. Sanford* rejecting a black person's ability to claim the rights enjoyed by whites under the Constitution:

The judgment of the court was that the words 'people of the United States' and 'citizens' meant the same thing, both describing 'the political body who, according to our republican institutions, form the sovereignty and hold the power and conduct the government through their representatives;' that 'they are what we familiarly call the 'sovereign people,' and every citizen is one of this people and a constituent member of this sovereignty;' but that the class of persons described in the plea in abatement did not compose a portion of this people, were not 'included, and were not intended to be included, under the word 'citizens' in the constitution;' that, therefore, they could 'claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States' . . . .<sup>165</sup>

## 1. Education

"Free" blacks often experienced segregation and discrimination in their search for education for themselves or their children, and before

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<sup>162</sup> See RUBIO, *supra* note 49, at 59–61 (discussing *The Civil Rights Cases* and the supposed "special treatment" of blacks by the Court).

<sup>163</sup> *The Civil Rights Cases*, 109 U.S. 3, 25–26 (1883).

<sup>164</sup> See *supra* Part III.B.

<sup>165</sup> *The Civil Rights Cases*, 109 U.S. at 31–32 (Harlan, J., dissenting).

the Civil War, express prohibitions on educating "free" blacks.<sup>166</sup> The laws governing the education of "free" blacks prior to Reconstruction may be divided into three types. The least common type barred teaching "free" blacks to read or write under any circumstance.<sup>167</sup> These laws were in place in Georgia and Alabama.<sup>168</sup> Virginia, South Carolina, and Ohio, in contrast, allowed the instruction of individual "free" blacks but prohibited "meetings" or schools to educate "free" blacks.<sup>169</sup> Other common prohibitions excluded blacks from public education or segregated their attendance in schools.<sup>170</sup> In Ohio, Missouri, and Indiana, legislation barred blacks from attending any public school, and in Massachusetts, the Supreme Judicial Court upheld *de jure* segregation under the state constitution.<sup>171</sup>

Following the Civil War, legally mandated segregation in education blossomed in the South while it gradually declined in the North.<sup>172</sup> In the South, segregation became the norm for public education.<sup>173</sup> Through legislative action, state officials consistently provided unequal funding to African American schools as compared with their white counterparts.<sup>174</sup> Discrimination by legislatures in funding segregated schools also included substantial discrepancies in the salaries of black and white teachers with comparable qualifications.<sup>175</sup> In many instances, schools for blacks only came about through the funding of black parents and white philanthropists.<sup>176</sup> In some cases, post-Reconstruction governments of the South refused to fund black education and, in other cases, officials opposed the establishment of schools regardless of

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<sup>166</sup> See GOODELL, *supra* note 30, at 319–25 (discussing the educations of enslaved and "free" blacks).

<sup>167</sup> HURD, *supra* note 146, at 105, 151.

<sup>168</sup> *Id.*

<sup>169</sup> GOODELL, *supra* note 30, at 319–21.

<sup>170</sup> HURD, *supra* note 146, at 170.

<sup>171</sup> *Id.*

<sup>172</sup> *De facto* segregation in education characterizes the historical and the contemporary reality for northern areas with large black populations. DUBOIS, *supra* note 44, at 637–69. Integrated education in areas with sizable black student bodies has never been a norm for American society. *Id.* In the South, law prevented it and in the North, practice prevented it. *Milliken v. Bradley*, 418 U.S. 717, 717 (1974) (highlighting the way local government and school officials in the North maintained school segregation in the absence of *de jure* legislation).

<sup>173</sup> Following the Civil War, southern states adopted Jim Crow laws governing education. DUBOIS, *supra* note 44, at 637–69.

<sup>174</sup> ROY L. BROOKS, *INTEGRATION OR SEPARATION: A STRATEGY FOR RACIAL EQUALITY* 9 (1996).

<sup>175</sup> *Id.*

<sup>176</sup> See DUBOIS, *supra* note 44, at 642–44.

funding.<sup>177</sup> As illustrated by *Cumming v. Board of Education of Richmond County*, school officials could close schools or refuse to fund entire levels of education for blacks despite its availability for whites.<sup>178</sup>

In its 1896 *Plessy v. Ferguson* decision, the Supreme Court upheld de jure segregation by the states.<sup>179</sup> The precedent established in *Plessy* continued as the law of the land until the 1954 Supreme Court decision in *Brown v. the Board of Education*.<sup>180</sup> The legally established discrepancies in teacher salaries, supplies, and facilities continued at various levels until well after 1954, when southern states and counties brought additional legal suits to challenge the implementation of *Brown*.<sup>181</sup>

## 2. Political Rights

Prior to 1865, “free” blacks encountered regular but varying bars to their participation in the political realm.<sup>182</sup> Of the thirteen original colonies, only Virginia, North Carolina, and South Carolina expressly denied “free” blacks the elective franchise before the Revolutionary War.<sup>183</sup> Nonetheless, as time passed, most of the remaining colonies withdrew the voting rights originally provided to “free” blacks.<sup>184</sup> Maryland’s original *Declaration of Rights* established in 1776, stated, “[e]very

<sup>177</sup> *Id.* at 646–47.

<sup>178</sup> *Cumming v. Bd. of Educ. of Richmond County*, 175 U.S. 528, 537 (1899) (upholding the Board of Education’s use of tax funds to build a new high school for white children despite its refusal to fund a high school for blacks).

<sup>179</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896).

<sup>180</sup> Prior to *Brown*, the Supreme Court issued a series of decisions requiring states to provide equal funding for segregated school systems including the establishment of graduate and professional schools to accommodate black students. See BROOKS, *supra* note 174, at 10. States that did not offer an equal alternative were required to allow blacks to attend the white schools. See *id.*

<sup>181</sup> See generally *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955) (initiating a lengthy series of lawsuits by state and local governments regarding the implementation of *Brown I*).

<sup>182</sup> See generally EMIL OLBRICH, *THE DEVELOPMENT OF SENTIMENT ON NEGRO SUFFRAGE TO 1860* (1969).

<sup>183</sup> In 1715, North Carolina expressly excluded blacks and Indians from voting. *Id.* at 8. This exclusion was dropped in a 1735 law restricting the franchise to freeholders. *Id.* South Carolina barred the voting and election privileges of blacks and Indians through a 1716 law, and Virginia barred the election privileges of blacks and Indians in 1705 and the voting privileges in 1762. *Id.* Although a Georgia election law of 1761 did not bar blacks from voting, its preamble stated that only free white men with the proper qualifications should be able to vote. *Id.* at 7–9.

<sup>184</sup> Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Pennsylvania chose not to disenfranchise blacks expressly. OLBRICH, *supra* note 182, at 17–24. Nonetheless, popular sentiment still restricted “free” blacks exercise of the franchise in these states. *Id.* at 14.



man having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage."<sup>185</sup> By 1809, however, attitudes had changed and legislation was passed to restrict the elective franchise to white men.<sup>186</sup> Consequently, by 1865 only Maine, New Hampshire, Vermont, Massachusetts, and Rhode Island provided equal franchise to "free" black men.<sup>187</sup> Although New York allowed "free" black men to vote prior to 1865, it required a substantial monetary payment from them not required of whites.<sup>188</sup>

Between 1790 and 1796, Kentucky, Vermont, and Tennessee all joined the Union without racial discrimination in the suffrage provisions of their constitutions.<sup>189</sup> Further, in 1799 Kentucky restricted the franchise to free white men in a new constitution.<sup>190</sup> In its initial constitution of 1802, Ohio also kept the franchise from "free" black men.<sup>191</sup> Tennessee did likewise through provisions in its 1834 constitution limit suffrage to white men.<sup>192</sup> From 1844 to 1857, Missouri, Iowa, Illinois, Minnesota, Michigan, Indiana, and California each denied black men the franchise through racially discriminatory constitutional provisions.<sup>193</sup> In most cases, the decision resulted from the direct vote of the electorate in the state.<sup>194</sup> In 1847, Wisconsin also decided, by referendum, to deny black suffrage.<sup>195</sup> In 1849, however, the question was resubmitted to the Wisconsin voters and black suffrage passed by a small margin with less than one third of the persons voting in the election casting a vote on the question.<sup>196</sup> Because of the low percentage of votes cast on black suffrage, blacks did not receive the elective franchise in Wisconsin until 1866 when the state Supreme Court validated the seventeen year old election results on black suffrage.<sup>197</sup>

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<sup>185</sup> HURD, *supra* note 146, at 19.

<sup>186</sup> *Id.* at 19.

<sup>187</sup> Of the original colonies, New Jersey and Connecticut expressly disenfranchised "free" blacks as did most of the other states who joined the union. OLBRICH, *supra* note 182, at 23-24.

<sup>188</sup> See HIGGINBOTHAM, *supra* note 5, at 261.

<sup>189</sup> *Id.* at 21.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 22.

<sup>192</sup> *Id.* at 39-40.

<sup>193</sup> See OLBRICH, *supra* note 182, at 79-107.

<sup>194</sup> See *id.*

<sup>195</sup> *Id.* at 86-87.

<sup>196</sup> *Id.* at 88-89.

<sup>197</sup> *Id.* at 89.

The opposition to black suffrage flowed from widespread notions of black inferiority and the commonly held fear of black immigration to the state.<sup>198</sup> The following view of a Michigan constitutional delegate reflects another important sentiment held at the time:

Negroes were more enlightened and happy in America than back in Africa . . . . The obligations of justice had been more than satisfied, and the people of Michigan were not bound to be so imprudent as to divide their political authority with negroes, or to let them have a share in piloting the ship of state on which they had been suffered to become passengers.<sup>199</sup>

By barring the franchise from “free” black men, the aforementioned states removed blacks’ opportunity to play the most basic role in the political governance of their lives or their communities.<sup>200</sup> As the following section will show, denying blacks the franchise prevented them from gaining political power in their communities that could threaten the country’s ubiquitous racial hierarchy.

With the ratification of the Fourteenth Amendment in 1868 and the continued protection of Union troops in the former confederate territories, black men in the South quickly became involved in politics. African Americans were placed in the United States House of Representatives, the United States Senate, hundreds of local offices, and on a state supreme court.<sup>201</sup> Less than ten years later, however, the tables turned.<sup>202</sup> The South had unseated its black elected officials and again

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<sup>198</sup> Across the state constitutional conventions, opponents of black suffrage regularly contested the black franchise because of its potential to attract “free” blacks to the state. See OLBRICH, *supra* note 182, at 79, 90–92, 95, 100–02.

<sup>199</sup> *Id.* at 97.

<sup>200</sup> The disenfranchisement of “free” black men had unique significance in that it represented the complete disenfranchisement of all blacks regardless of their gender, wealth, or servitude. See *supra* notes 126–29 and accompanying text.

<sup>201</sup> KLARMAN, *supra* note 6, at 10.

<sup>202</sup> This provides one example of the instability of black rights. Rather than a slow and steady march toward freedom, blacks living through the “Reign of Terror,” at best meandered to America’s discordant refrain of rights and liberties. See HIGGINBOTHAM, *supra* note 5, at 32–40. Subsequent generations of blacks often experienced the removal of rights and privileges that their foreparents enjoyed. *Id.* The original Africans in the colonies came as indentured servants, but within two generations blacks and their progeny had become enslaved chattel in perpetuity. DUBOIS, *supra* note 44, at 417–40. In Maryland, Tennessee, New Jersey, and other states, blacks who enjoyed voting rights during one period had them legally removed from subsequent generations. *Id.* This pattern occurred again following Reconstruction when blacks reached high political offices only to lose these offices and the right to vote in a twenty year time span. JOHN HOPE FRANKLIN, *LEGAL DISENFRANCHISEMENT OF THE NEGRO* 215–241 (Paul Finkelman ed., 1992). The rights

denied black men the franchise, while the North had permanently extended political citizenship rights.<sup>203</sup> By 1878, southern officials had begun the systematic exclusion of blacks, who represented a majority in many southern counties, from political involvement.<sup>204</sup> In addition to physical violence and the destruction of homes and crops, southern whites used legal enactments and referenda, ultimately upheld by state and federal judiciaries, to prevent black political involvement.<sup>205</sup> Arkansas, Florida, and Tennessee passed legislation to bar black participation, while Mississippi, South Carolina, Louisiana, Alabama, Virginia, North Carolina, Texas, and Georgia all modified their constitutions to exclude blacks through poll taxes and registration requirements.<sup>206</sup> White officials selectively administered new registration requirements to legitimate the exclusion of blacks from political participation.<sup>207</sup> Along with violence and intimidation, racially discriminatory voting laws governed the political participation of the vast majority of African Americans until the passage of the Voting Rights Act of 1965.<sup>208</sup>

### 3. Economic Freedoms

To maintain economic subordination, white officials systematically and tenaciously used antebellum and post-reconstruction law to deny "free" blacks the opportunity to compete fairly with whites and to amass wealth.<sup>209</sup> Legally imposed restraints, common against "free" blacks both before and after the Civil War, greatly limited their ability to pro-

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enjoyed and the offices held during Reconstruction were not experienced again for over four generations. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 215–16 (1974).

<sup>203</sup> The passing of the Fifteenth Amendment led to mass enfranchisement outside of the South, but was largely nullified within it through racially biased election laws and practices. STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* 30–31 (1997).

<sup>204</sup> *Id.*

<sup>205</sup> The Supreme Court upheld the literacy test, the poll tax, and non-state mandated white primaries in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 52–53 (1959), *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937), and *Grovey v. Townsend*, 295 U.S. 45, 52 (1935) respectively. See Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 541–42 (1973).

<sup>206</sup> See WHEN SORRY ISN'T ENOUGH, *supra* note 11, at 401–404; WOODWARD, *supra* note 202, at 83–85.

<sup>207</sup> THERNSTROM & THERNSTROM, *supra* note 203, at 30–31.

<sup>208</sup> *Id.* at 154–57.

<sup>209</sup> See generally HURD, *supra* note 146 (providing a state by state examination of legal restraints).

vide for themselves and their families.<sup>210</sup> These laws regularly limited their employment as well as their enterprise opportunities.<sup>211</sup>

The greatest economic threat facing “free” blacks was the constant danger of enslavement.<sup>212</sup> The majority of the states passed laws prohibiting “free” blacks from immigrating into their jurisdictions, subjecting violators to a substantial fine and enslavement.<sup>213</sup> Besides these common prohibitions on travel and the threat of slave catchers and kidnappers, colonies and states implemented additional legal mechanisms that placed “free” blacks at considerable risk. The District of Columbia provides one interesting example. In 1820, the federal government disenfranchised the “free” blacks of Washington D.C. by limiting the election of city officers to white citizens.<sup>214</sup> Congress granted a special power to these officers to set the terms and conditions of residence for “free” blacks in the city.<sup>215</sup> By ordinance, in 1827 the officers set several restrictions on “free” blacks present in the district.<sup>216</sup> These restrictions included registering their presence, obtaining two freehold sureties of five hundred dollars for their good behavior, and proving their freedom.<sup>217</sup> Further, the ordinance required that any black person unable to prove their freedom would be sold into slavery.<sup>218</sup> Along similar lines, Florida law required that a “free” black who failed to satisfy a judgment for a debt within five days be sold at an auction to satisfy the debt.<sup>219</sup> Perhaps the most egregious of these laws were those found in Pennsylvania, Rhode Island, Delaware, Georgia and Illinois, allowing authorities to hire out “free” blacks as lifetime “servants” when they deemed it proper.<sup>220</sup>

In addition to these laws, states and colonies placed a multitude of legal restrictions on “free” blacks’ ownership rights and employment opportunities. In the early eighteenth century, New York and

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> See *supra* text accompanying notes 150–51.

<sup>213</sup> See *supra* text accompanying notes 150–51.

<sup>214</sup> WILLIAM JAY, *VIEW OF THE ACTION OF THE FEDERAL GOVERNMENT IN BEHALF OF SLAVERY* 44 (1969).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 40.

<sup>220</sup> HURD, *supra* note 146, at 76, 104. Pennsylvania went further by ordering that all the children of “free” blacks be bound out until the age of twenty-one for girls and twenty-four for boys. HIGGINBOTHAM, *supra* note 5, at 285.

New Jersey excluded "free" blacks from owning real property.<sup>221</sup> More than a century later, the United States Congress excluded "free" blacks from homesteading opportunities in the Pacific Northwest.<sup>222</sup> During the same time period, California restricted blacks from the homesteading within its borders.<sup>223</sup> Some states specifically prohibited "free" blacks from owning a white Christian indentured servant.<sup>224</sup> In such cases, the blacks' purchase of such a servant was deemed to acquit the indenture.<sup>225</sup> Financially, some states required "free" blacks to make greater contributions in taxes than whites: Georgia required "free" blacks to pay a tax on their own heads (six times higher than masters paid per head for enslaved blacks), and South Carolina placed an exclusive capitation tax on "free" blacks.<sup>226</sup>

The most extensive legal constraints on "free" blacks' economic opportunities, however, related to employment or enterprise in the South. These laws restricted a wide range of engagements for "free" blacks including handicraft, pioneering, trading, print setting, retail clerking, home repair, masonry, mechanics, home construction and repair, law, and carrying or handling the United States mails.<sup>227</sup> Severe racial distinctions in the law otherwise governing "free" blacks further restricted their economic liberty.<sup>228</sup>

States' and colonies' general prohibition against "free" blacks testifying against whites also severely limited their ability to protect their earnings or enforce contracts against whites.<sup>229</sup> In some states, challenging whites itself had legal ramifications. In Louisiana, "free" blacks were subject to imprisonment for conceiving of themselves as

<sup>221</sup> Cf. GOODELL, *supra* note 30, at 89–92, 355–56, 390.

<sup>222</sup> See generally Inara K. Scott, *A Window for Change*, 37 WILLAMETTE L. REV. 433 (2001) (discussing the Donation Land Claim Act's novel extension of land claim rights to white women). Despite the 1850 Act's extension of land rights to the white wives of white male claimants, it excluded blacks completely from the 160 acre grants. Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953, 969 (1998).

<sup>223</sup> Robert L. Carlton, *Blacks in San Diego County*, 21 J. SAN DIEGO HIST. 1, 1 (1975).

<sup>224</sup> Cf. HURD, *supra* note 146, at 9.

<sup>225</sup> *Id.* Likewise, "free" blacks purchased enslaved blacks in many instances to free the enslaved parties.

<sup>226</sup> HIGGINBOTHAM, *supra* note 5, at 205, 264.

<sup>227</sup> These restrictions varied from state to state but were concentrated in Georgia, South Carolina, Mississippi, Florida, Tennessee, and Maryland. See, e.g., HURD, *supra* note 146, at 94–105. The proscription against handling the United States mails applied equally across the country based on 1810 Congressional Legislation. Leon F. Litwick, *The Federal Government and the Free Negro 1790–1860*, 43 J. NEGRO HIST. 261, 261–62 (1958).

<sup>228</sup> See GOODELL, *supra* note 30, at 355–63.

<sup>229</sup> See *id.* at 356–57.

equal with whites and showing them disrespect or making an insult.<sup>230</sup> Even when “free” blacks owned property, discriminatory laws prevented them from protecting those rights by force of arms or law.<sup>231</sup>

After the Civil War, Southern states passed the Black Codes which placed further restrictions on African American economic opportunity.<sup>232</sup> For example, through these codes, white police officers had the authority to arrest and fine blacks as vagrants if they were not employed by a white person.<sup>233</sup> Although reconstructed southern legislatures annulled the most offensive aspects of these codes by 1868, a new system rose from its ashes at the close of the reconstruction era.<sup>234</sup> South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, Virginia, Arkansas, and North Carolina each enacted new similar vagrancy laws between 1893 and 1909.<sup>235</sup> Under the new regime, authorities arrested blacks on vagaries such as idleness or immorality if they “had no property to support them.”<sup>236</sup> Once arrested, authorities would require blacks to work for a white planter to pay their fine and court costs.<sup>237</sup> Blacks were then required to work for the planter who would also charge them for food and lodging.<sup>238</sup> These charges invariably equaled or exceeded the earnings the black workers were entitled to at the end of the year.<sup>239</sup> Consequently, the original fine the workers were required to pay off would never be liquidated and the workers would find themselves unable to free themselves from the relationship.<sup>240</sup>

This system of near servitude was sometimes coupled with convict-leasing, a practice that operated in many parts of the South well into the twentieth century.<sup>241</sup> Under convict-leasing, white officials would arrest African Americans on some minor misdemeanor and charge them a fine and substantial court fees.<sup>242</sup> At the courthouse, a white

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<sup>230</sup> HURD, *supra* note 146, at 162.

<sup>231</sup> See GOODELL, *supra* note 30, at 356–57; HURD, *supra* note 146, at 159.

<sup>232</sup> EQUAL PROTECTION AND THE AFRICAN AMERICAN CONSTITUTIONAL EXPERIENCE: A DOCUMENTARY HISTORY 109–13 (Robert P. Green, Jr. ed., 2000) [hereinafter EQUAL PROTECTION].

<sup>233</sup> *Id.* at 112.

<sup>234</sup> KLARMAN, *supra* note 6, at 71.

<sup>235</sup> William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 47 (1976).

<sup>236</sup> *Id.*

<sup>237</sup> EQUAL PROTECTION, *supra* note 232, at 181–82.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Cohen, *supra* note 235, at 50–53.

<sup>242</sup> *Id.* at 53.

employer would pay the fine and fees in exchange for working off the debt.<sup>243</sup> Most blacks who refused the offer found themselves leased out on a chain gang or other prison work unit to work in the mines or to build roads, bridges, and railroads.<sup>244</sup> Through this and similar laws, blacks found themselves locked into an inescapable cycle of debt and work.<sup>245</sup>

Whites excluded blacks from law enforcement, and from judicial, legal, and other public offices throughout the South, despite the significant number of blacks in southern communities.<sup>246</sup> Teaching and administering segregated schools represented the one public sector position that was generally available to blacks. Nonetheless, as shown in *Alston v. School Board of Norfolk, Va.*, southern states routinely paid blacks substantially less money for the same teaching jobs.<sup>247</sup> The Supreme Court's earlier ruling in the *Civil Rights Cases* protected the right of whites to discriminate against blacks in the private sector. The public sector generally followed the same practice until *Brown v Board of Education*.<sup>248</sup>

Further, routine and lawful discrimination against blacks also denied them entry into higher education, which severely restricted their ability to gain the skills and knowledge needed to enter certain careers and occupations. Further, states discriminated against black land grant colleges by providing limited funding for their operation.<sup>249</sup> Black colleges' curriculums offered very little beyond education courses.<sup>250</sup> Instead of mechanical or professional training, black land grant colleges could only offer courses in limited areas such as shoe-making and repair, tailoring, and carpentry.<sup>251</sup>

In the southern private sector, whites paid blacks lower wages for the same work in both agricultural and limited industrial positions.<sup>252</sup> Lawful discrimination in the credit sector foreclosed the opportunity

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 55–58. In addition to the lost economic opportunities, blacks regularly lost their lives while performing hazardous work under brutal and unsafe conditions. *Id.*

<sup>245</sup> EQUAL PROTECTION, *supra* note 232, at 182–83.

<sup>246</sup> THERNSTROM & THERNSTROM, *supra* note 203, at 26–30.

<sup>247</sup> See *Alston v. Sch. Bd. of Norfolk, Va.*, 112 F.2d 992, 994–95 (4th Cir. 1940).

<sup>248</sup> Although the 4th Circuit declared the racialized salaries unconstitutional, the practice continued legally in other jurisdictions until *Brown I* declared school segregation unconstitutional. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954).

<sup>249</sup> RUBIO, *supra* note 49, at 72.

<sup>250</sup> *Id.* at 73.

<sup>251</sup> *Id.*

<sup>252</sup> THERNSTROM & THERNSTROM, *supra* note 203, at 33–35.

to obtain financing for a majority of blacks.<sup>253</sup> Lenders regularly denied blacks' requests for credit.<sup>254</sup> This practice, in conjunction with mob violence by whites, functioned to keep blacks in a subordinate, non-competitive economic position.<sup>255</sup>

Following the civil war, blacks in northern cities also faced substantial discrimination in employment, housing, and access to credit.<sup>256</sup> Labor unions, employers, and private individuals legally discriminated against blacks with impunity.<sup>257</sup> The preference for whites in employment provided job opportunities to newly arrived European immigrants that were unavailable to black workers.<sup>258</sup> In housing, private restrictive covenants prohibiting sales to African Americans were in force and upheld in court.<sup>259</sup> In the absence of strict Jim Crow laws, however, northern blacks still enjoyed more freedom than their southern counterparts. The North thus attracted large numbers of blacks hoping to escape the Black Codes and lynching laws that openly ruled in the South. In response to the influx of blacks from the South into northern cities, urban white residents increasingly utilized the ultimate economic constraint on blacks: violence.<sup>260</sup>

The federal government also participated in the economic subordination of blacks through the administration of its programs and its employment policies.<sup>261</sup> President Woodrow Wilson lawfully instituted segregation policies in federal employment in 1913 and continued the military segregation policies that limited blacks' opportunities to ad-

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<sup>253</sup> See RUBIO, *supra* note 49, at 121 (providing examples of routine discrimination by banks in providing loans to blacks); see also MICHAEL BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTION/CONFLICT IN THE POST-BROWN SOUTH* 5-7 (1987) (examining violence as a means of maintaining white supremacy in all aspects of life).

<sup>254</sup> BELKNAP, *supra* note 253, at 5-7.

<sup>255</sup> See RUBIO, *supra* note 49, at 84-86 (considering violence as an additional means of economic control of blacks).

<sup>256</sup> FEAGIN, *supra* note 61, at 62.

<sup>257</sup> *Id.* at 62-67.

<sup>258</sup> *Id.*

<sup>259</sup> The Supreme Court's ruling in *Corrigan v. Buckley*, that private housing discrimination did not offend the Constitution, legally sanctioned and encouraged the use of racially restrictive covenants to limit blacks' ability to obtain real property. See 271 U.S. 323, 331 (1926).

<sup>260</sup> RUBIO, *supra* note 49, at 86. "Besides Wilmington [North Carolina], post-Reconstruction white supremacist pogroms occurred in such cities as Danville, Virginia, in 1883; Phoenix, South Carolina, in 1898; New Orleans and New York in 1900; Springfield, Ohio, in 1904; Atlanta and Greenberg, Illinois, in 1906; and Springfield, Illinois, in 1908." *Id.* at 68. See also LEON LITWICK, *NORTH OF SLAVERY* 158-60 (1961) for an examination of white labor hostility toward black competition and northern violence against blacks.

<sup>261</sup> See FEAGIN, *supra* note 61, at 181-82.



vance through the military ranks.<sup>262</sup> During the New Deal, the federal government instituted a host of federal programs that were intended to aid Americans in a wide range of areas. These programs, however, routinely discriminated against blacks in employment, housing, and funding.<sup>263</sup> New Deal programs provided special financial assistance to white farmers, businesses, and bankers that were unavailable to blacks.<sup>264</sup> The Federal Housing Administration discriminated against blacks in obtaining housing subsidies and supported racially restrictive covenants that barred blacks from purchasing many homes.<sup>265</sup> During this period preceding and following World War II, the federal government offered numerous programs to aid white contractors, builders, and other businesses that were unavailable to their black counterparts.<sup>266</sup>

The foregoing laws illustrate a very critical characteristic of the "Reign of Terror:" racism as legal right and obligation. Under the laws above and those articulated below, the mistreatment of and discrimination against blacks often represented a legal obligation. One consistent aspect of many of the laws passed was the imposition of penalties upon white who failed to follow the laws.<sup>267</sup> Rather than the actions of a select group of unenlightened white persons, the subordination and exclusion of blacks constituted the politically and socially mandated conduct for all whites.<sup>268</sup> This political mandate, moreover, flowed from democratic institutions at the heart of American society, rather than from a tyrannical imposition forced upon citizens by their government. Discriminatory laws were passed by freely elected legislatures.<sup>269</sup> Generally, these laws stood as reflections of communal desire to maintain the subordination and servitude of free blacks.<sup>270</sup>

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<sup>262</sup> RUBIO, *supra* note 49, at 82.

<sup>263</sup> FEAGIN, *supra* note 61, at 181–82.

<sup>264</sup> *Id.* at 182.

<sup>265</sup> *Id.*; see also RUBIO, *supra* note 49, at 120–23 (discussing the Fair Housing Administration's segregationist policies that encouraged discrimination against blacks in housing).

<sup>266</sup> See FEAGIN, *supra* note 61, at 181–82. Building permits, franchises, and licenses were also made available to whites in a racially biased manner. *Id.*

<sup>267</sup> See *supra* Part III.

<sup>268</sup> See DE TOQUEVILLE, *supra* note 9, at 348–75.

<sup>269</sup> America's brand of democracy, during most of this time, excluded white women from participation along with blacks and others. See FRANKLIN, *supra* note 202, at 215–41.

<sup>270</sup> The regular and consistent use of lynching and race riots by whites, with few if any legal ramifications, provided an ultimate check on black life. See RUBIO, *supra* note 49, at 64–68 (considering the use of race riots and lynchings by whites to suppress black political and economic competition).

### C. Civil Rights for African Americans

After the Civil War, two sets of competing laws were passed concerning African Americans. At the state level, many southern governments adopted Black Codes that established a quasi system of slavery.<sup>271</sup> At the federal level, however, a series of constitutional amendments were ratified that promised blacks equal treatment before the law. The 13th Amendment prohibited slavery and involuntary servitude,<sup>272</sup> the 14th Amendment promised equal protection before the law,<sup>273</sup> and the 15th Amendment provided black men with enfranchisement.<sup>274</sup> In the South, all three of these amendments were effectively nullified through racially neutral state laws and private actions held beyond the reach of constitutional protections by the Supreme Court.<sup>275</sup> Additionally, the reconstruction Congress passed the Ku Klux Klan Act, restricting Klan activity, and the Civil Rights Act of 1875, prohibiting some forms of private discrimination.<sup>276</sup> Both of these laws were later ruled unconstitutional by the Supreme Court.<sup>277</sup> In the early part of the twentieth century, the Supreme Court began to require that states provide equal services under segregation. By 1954, the federal government had begun to prohibit discrimination and segregation in its own practices concerning the military and some federal employment.<sup>278</sup>

After *Brown*, federal courts began to find segregation in a variety of areas unconstitutional.<sup>279</sup> Ten years after *Brown*, Congress joined the courts in challenging racial discrimination against blacks in public accommodations, employment, and the use of federal funds.<sup>280</sup> Congress went on the next year to pass the Voting Rights Act of 1965, the Fair Housing Act in 1968, and the Equal Employment Opportunity Act (EEO Act) in 1972 barring discrimination in the elections process, housing, and guiding affirmative employment practices, respectively.<sup>281</sup>

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<sup>271</sup> See generally RACE, LAW, AND AMERICAN HISTORY 1700–1990: THE AGE OF JIM CROW, SEGREGATION FROM THE END OF RECONSTRUCTION TO THE GREAT DEPRESSION (Paul Finkelman ed., 1992) (surveying post Civil War laws across the South establishing black subordination).

<sup>272</sup> U.S. CONST. amend XIII.

<sup>273</sup> U.S. CONST. amend XIV.

<sup>274</sup> U.S. CONST. amend XV.

<sup>275</sup> See generally RACE, LAW, AND AMERICAN HISTORY 1700–1990, *supra* note 271.

<sup>276</sup> EQUAL PROTECTION, *supra* note 232, at 127–28.

<sup>277</sup> *Id.* at 140–44.

<sup>278</sup> *Id.* at 236–37.

<sup>279</sup> KLARMAN, *supra* note 6, at 361–62.

<sup>280</sup> EQUAL PROTECTION, *supra* note 232, at 267–74.

<sup>281</sup> *Id.* at 277–82, 289–91.

None of these acts, however, focused specifically upon African Americans as a group or the actions necessary to repair the individual and collective harms visited upon blacks over the preceding one hundred years. Instead, each statute prohibits discrimination generally based on race, color, or national origin.<sup>282</sup> Together, these statutes extend the civil liberties enjoyed by whites to blacks and others, but still fall short of the full sense of liberation advocated by abolitionists Benjamin Franklin and Wendell Phillips and elaborated by moral philosopher Timothy Jackson. Consequently, the legislation protects the rights of all Americans—black, white, and otherwise—against racial discrimination. But the laws fail to move toward the goal of reparations: to provide blacks with the educational, political, and economic resources necessary to enable them to fully exercise and enjoy their civil liberties.<sup>283</sup>

The foregoing analysis provides a glimpse, albeit abbreviated, into the legal regime governing the lives of African Americans from their initial arrival in Virginia to the passage of the EEO Act of 1972. The sketch illustrates that positive law functioned as the formal means by which whites denied African Americans their humanity and their citizenship over four centuries.<sup>284</sup>

The sketch also demonstrates that, in contrast, during the latter part of the twentieth century, law served as the formal means by which the federal government required state governments and private citizens to cease and desist from discriminatory acts against persons based on race.<sup>285</sup> In other words, this period reversed the legal subordination that characterized so much of African Americans' experience over the previous four centuries. These civil rights laws were instituted to proscribe discrimination based on race, color, or national origin, and offered protection to all Americans from mistreatment and discrimination.<sup>286</sup> Through investigating both the laws used to deny African Americans' humanity and citizenship, and the laws intended to protect them, this article highlights a fundamental limitation of the later: rather than remedying the past effects of the laws denying African American humanity and citizenship, civil rights laws merely prohibited future denials of the humanity and citizenship rights of its residents and citizens. These laws represent crucial legislation to direct and enforce the reordering of social relations to prevent the types of harms

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<sup>282</sup> *Id.*

<sup>283</sup> *See supra* Part I.

<sup>284</sup> *See supra* Part III.A–B.

<sup>285</sup> *See supra* Part III.C.

<sup>286</sup> *See supra* Part III.C.

suffered by African Americans and others from being visited upon anyone in the future, but they leave the question of repairing past wrongs unaddressed.<sup>287</sup>

#### D. *An Analysis of the Legal Issues*

In light of the damage done to African Americans and their communities educationally, politically, and economically by the law, civil rights laws represented a needed yet insufficient response by federal, state, and local governments. Today, civil rights laws are crucial to support the ideas of fairness and justice for all races in American relations. These laws are the primary formal means of ensuring that race no longer justifies legal inferiority.<sup>288</sup> They do not offer remedies, however, for the regular and recurring disenfranchisement of African Americans that was experienced by “free” and enslaved blacks in both the North and the South.<sup>289</sup> Likewise, civil rights laws fail to offer any remedial scheme to redress the systematic exclusion of the enslaved and “free” blacks from equitable participation in the economic system. Civil rights laws have reversed the centuries-old practice of excluding African Americans from public educational institutions and inequitably funding black schools at the tertiary, secondary, and primary levels of education.<sup>290</sup> These laws do not mention how to remedy three centuries of educational exclusion affecting over seventeen generations of African Americans.<sup>291</sup>

Under the “Reign of Terror,” most statutes, ordinances, and decisions regarding African Americans focused on the conduct of enslaved and “free” blacks.<sup>292</sup> Even when legislation penalized whites for their interaction or involvement with blacks, the true purpose of the laws was to prevent African Americans from exercising certain free-

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<sup>287</sup> See *supra* Part III.C. American civil rights legislation characteristically omitted measures for compensatory or injunctive relief for the victims of historic discrimination against blacks in voting, education, or lending—much less enslavement, forced peonage, unequal wages, or the denial of public services—that characterized black life under the “Reign of Terror.” BROOKS, *supra* note 49, at 156–57.

<sup>288</sup> Needless to say, while these laws establish a standard for behavior that persons can be held accountable for, they do not and cannot prevent discrimination and mistreatment based on race against African Americans, Latinos, Native Americans, Asians, and whites.

<sup>289</sup> See *supra* Part III.C.

<sup>290</sup> EQUAL PROTECTION, *supra* note 232, at 269–72.

<sup>291</sup> See *id.* at 275.

<sup>292</sup> Early legislation and decisions also addressed enslaved and free Indians.

doms reserved for whites.<sup>293</sup> An example of this is seen in the fairly common legislation in most states proscribing enslaved blacks from buying or selling goods.<sup>294</sup> Under these laws, whites would be penalized, though not as harshly as their black counterparts, for buying, selling, or trading with blacks. Other examples were laws prohibiting blacks from being taught to read or from hiring themselves out “for work on their own account.”<sup>295</sup> Blacks caught violating these laws were punished for reading, trading, or hiring themselves out, while whites charged with violating these statutes were penalized for their support or encouragement of unlawful conduct by blacks.<sup>296</sup>

The “Reign of Rights,” in contrast, directs its focus upon the behavior of those who would deny persons the liberty to engage in covered activities. The Fair Housing Act focuses upon the conduct of persons using race, color, or national origin to deny housing to someone else.<sup>297</sup> Likewise, Title VII focuses upon the improper conduct of those who base hiring, promotion and other job opportunities on race, color, or national origin.<sup>298</sup> Public accommodations legislation also looks specifically at actions taken to deny persons access to public accommodations based on their race color or national origin.<sup>299</sup> In each of the foregoing statutes, the legislation seeks to prevent the denial of rights based on some impermissible criterion such as race. Persons found guilty of violating these statutes are required to cease such conduct and to allow persons discriminated against to participate in the governed activity.<sup>300</sup>

One way of understanding these laws in relation to African Americans’ legal history would be that the “Reign of Terror” inflicted harm upon enslaved and “free” blacks because of their race, and that the “Reign of Rights” guards their descendants against similar harm based on their race. In this light, the essential role of civil rights law for blacks today is to protect them from the type of treatment visited upon their ancestors.<sup>301</sup> Moreover, the “Reign of Rights” goes beyond

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<sup>293</sup> See HIGGINBOTHAM, *supra* note 5, at 26–28 (considering the motivations of legislatures, judges, and others in establishing the laws governing black life).

<sup>294</sup> See *supra* text accompanying note 131–36, 140.

<sup>295</sup> See *supra* text accompanying notes 138–40.

<sup>296</sup> See *supra* notes 130–143 and accompanying text.

<sup>297</sup> Fair Housing Act, 42 U.S.C. § 3601 (1968).

<sup>298</sup> See Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1964).

<sup>299</sup> See 42 U.S.C. § 2000(a).

<sup>300</sup> EQUAL PROTECTION, *supra* note 232, at 267–74, 289–91.

<sup>301</sup> During the “Reign of Terror” others suffered substantial discrimination as well. Native Americans, immigrants, and other racial minorities were victimized under the system,

the protection of blacks from racially-based harms—it protects Latinos, Asians, Native Americans, and other minority groups from such mistreatment as well.<sup>302</sup> The laws likewise extend to whites.<sup>303</sup> Although no governmentally sanctioned injustices have been perpetrated against whites because they were white, extending civil rights protection to them was also necessary to ensure that no citizens found themselves the victims of the kinds of harms perpetrated upon blacks during the “Reign of Terror.” In a pluralistic society like America, whites, like all other participants, also need the protection of law to secure their rights.

Between the framework of the two regimes, however, a legal void still lingers. African Americans and their communities suffered specific harms and damages from the “Reign of Terror” distinct from those experienced by Latinos, Asians, and Native Americans.<sup>304</sup> Civil rights laws that merely guard against future wrongs committed against any racial group, do not attend to the damage inflicted by the 353 year lifespan of the “Reign of Terror.”<sup>305</sup>

#### IV. RIGHTS BUT NOT REMEDIES

Due to the law’s prominent role in subordinating blacks, this article maintains that African Americans today cannot depend on the law alone as the guarantor of their status and well-being.<sup>306</sup> Instead,

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although the racial badge of slavery and Jim Crow were affixed to blacks in unique ways. *See generally* A READER ON RACE, CIVIL RIGHTS AND AMERICAN LAW: A MULTIRACIAL APPROACH (Timothy Davis et al. eds., 2001).

<sup>302</sup> Race based civil rights legislation uniformly prohibits discrimination based on race, color, and national origin. EQUAL PROTECTION, *supra* note 232, at 267-73.

<sup>303</sup> *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978).

<sup>304</sup> The enslavement visited upon successive generations of blacks over the course of three centuries followed by their systematic disenfranchisement and subordination as a matter of law and practice represents a unique experience among America’s racial and ethnic groups. *See* FEAGIN, *supra* note 61, at 205–09.

<sup>305</sup> *See supra* Part III.C.

<sup>306</sup> Blacks’ status under American law has been a cyclical fluctuation from hostility to facial neutrality. *See supra* Part III.A–B. Rather than a constant progression in their legal status from the beginning of the “Reign of Terror” to the end of the “Reign of Rights,” blacks have often had legal freedoms and equality stripped from them at both the state and federal level through executive actions, legislation, or judicial decisions. *See supra* Part III.A–B. Just as the first enslaved Africans enjoyed freedoms and protections under law that many of their descendants would never experience, generations of “free” blacks had voting rights, economic rights, and educational rights under the law that were subsequently stripped from them and their children. *See supra* Part III.A–B. From a historical perspective, for 344 years of blacks’ 386 year sojourn in America, the law was repeatedly and intentionally used to maintain black subjugation to whites. *See supra* Part III.A–B.

they must focus upon gaining and maintaining power in the educational, political, and economic spheres of society. By doing so, blacks can gain a level of protection for both their well-being and their legal status, which the law alone cannot provide.<sup>307</sup> To examine this issue further, this article explores the work of scholars Kimberle' Williams Crenshaw, Derrick Bell and Ralph Bunch who analyze the successes and failures of civil rights laws in protecting blacks. In different ways, each author highlights the historic limitations of the "Reign of Rights" and the American legal system more broadly. These contributions support the contention presented in this article that the law alone is unable to secure blacks' status and well-being.

In one of the foundational articles on critical race theory, Kimberle' Williams Crenshaw examines civil rights history to point out two competing views historically present in civil rights laws: the Restrictive View and the Expansive View.<sup>308</sup> The Restrictive View, often adopted by conservatives, characterizes civil rights laws as creating a formal equality irrespective of race, without regard to results.<sup>309</sup> The Expansive View, in

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In light of the short time period that law has arguably been neutral toward African Americans, additional periods of regression and decline in African American legal status could still be in America's future. BLACK PROTEST THOUGHT, *supra* note 75, at 195. The purpose of this article is not to predict that law will become hostile towards blacks, but to point out how law has and still can be used to restrict blacks' enjoyment of freedom and equality within the society. In this sense, the history of blacks' legal status under American law is also the history of blacks' social status in American society. The law represented a tool by which societal beliefs and fears about race were codified and preserved.

<sup>307</sup> This serves as a merging of the DuBois and Washington philosophies in the early twentieth century. DuBois advocated the pursuit of civil/political rights for blacks, while Washington promoted the development of economic power as a means of securing enhanced well-being and legal equality. W.E.B. DuBois, THE SOULS OF BLACK FOLKS 36-50 (Penguin Classics 1996) (1903).

<sup>308</sup> Crenshaw, *supra* note 8, at 1341. This article critiques the characterization of the civil rights law given by neoconservative Thomas Sowell and the Critical Legal Studies appraisal by Thomas Kushnet. Using both men as representatives of larger critiques of contemporary civil rights advocacy, Crenshaw methodically demonstrates the significant shortcomings of both ideological boundaries. *Id.* at 1334. In brief, according to Crenshaw, Sowell maintains that civil rights laws were intended merely to remove the barriers of racial injustice to establish equal opportunity, regardless of race, as the new paradigm for American decision-making in politics, economics, and education. *Id.* at 1338-41. According to Crenshaw, Sowell maintains that this is embodied through a system of formal equality that disregards race consciousness in decision making. *Id.* Sowell therefore maintains that race-based programs are antithetical to civil rights and equal opportunity and should be abolished. *Id.* Moreover, Sowell argues that the experience of poverty by a black underclass results from their individual choices and not their race, so affirmative action and related programs misdirect them to look to a government program to remedy their situation and not their own impoverished culture. *Id.* at 1343-46.

<sup>309</sup> *Id.*

contrast, characterizes civil rights laws as attending to the consequences of historic racism by considering the results as well as the process of decision-making.<sup>310</sup> Crenshaw's chief critique of the Restrictive View is that it neglects the present consequences of past discrimination and the line of historic judicial decisions supporting the use of civil rights laws to address such consequences.<sup>311</sup> She also points out that past discrimination had adverse consequences that extend into the present and future, which were not addressed by anti-discrimination law based on equality as a process.<sup>312</sup>

In critiquing the Restrictive View, Crenshaw highlights the historic tension between the two views, but fails to note the Restrictive View's greater consistency with the racially biased history of the American legal system.<sup>313</sup> In short, the Restrictive View's vision of the civil rights law is the most compatible with the narrow and formalistic reading of judges who intended to maintain society's system of racial subordination of blacks.<sup>314</sup> Under this regime, as shown above, the American legal system authorized and frequently dictated the subordination of blacks to whites.<sup>315</sup> Over the course of three centuries, legal decisions such as *Plessy v. Ferguson*, *The Civil Rights Cases*, and *Dred Scott* ostensibly used neutral legal principles as the basis for maintaining blacks' racial subordination to a dominant white majority.<sup>316</sup> The courts' ventures into the Expansive View, though real, represent the exception more than the rule.<sup>317</sup> As shown above, the courts, legislatures, and executive branches regularly used neutral legal principles as a means of securing and preserving the interests of America's white majority.<sup>318</sup> As seen with the abysmal failure to integrate America's schools despite the bold pronouncements of *Brown*, as well as the courts' concessions in post-*Brown* cases, the white majority prefers a Restrictive View of civil rights that supports what is understood as in its best interests.<sup>319</sup> As used today, the Restrictive View arguably accomplishes a similar purpose—to protect

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<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 1342–43.

<sup>312</sup> *Id.* at 1345.

<sup>313</sup> See *supra* Part III.A–B.

<sup>314</sup> See *supra* Part III.A–B.

<sup>315</sup> See *supra* Part III.A–B.

<sup>316</sup> See generally 163 U.S. 537 (1896), 109 U.S. 3 (1883), 60 U.S. 393 (1856).

<sup>317</sup> See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Sweat v. Painter*, 339 U.S. 629 (1950); *Smith v. Allwright*, 321 U.S. 649 (1944) (representing employment of an Expansive View of civil rights).

<sup>318</sup> See *supra* Part III.A–B.

<sup>319</sup> See generally Bell, *supra* note 6 (discussing this point regarding civil rights law developments from 1954 forward).



the interest of the country's white majority from losing benefits to African Americans and others.<sup>320</sup>

In this regard, Derrick Bell's assessment of what he calls "Racial Realism" provides an important and more accurate assertion that equality is beyond the limits of what America's existing legal system can and will provide. Bell explains:

Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it and move on.<sup>321</sup>

This article's examination of the "Reign of Terror" supports Bell's claim that America's racial history regarding blacks has been a cyclical process of advancements and setbacks, depending upon the needs and perceptions of the white majority.<sup>322</sup> Any confidence in progress as either a historical necessity or predetermined outcome of societal enlightenment on race is misplaced. African Americans continue to occupy a tenuous precipice between advancement and setback.<sup>323</sup>

Similarly, political scientist Ralph Bunche clearly recognized the limitations of law and the Constitution on racial matters in the 1930s. Bunche felt that black reliance on civil liberties to secure equal status

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<sup>320</sup> This could be based on a simple utilitarian calculus or a notion of white entitlement. See FEAGIN, *supra* note 61, at 88–93, 99–103. This phenomenon is implicit in modern political practices and rhetoric regarding affirmative action, welfare, reparations, and any topics viewed as primarily promoting the interests of African Americans. See *id.* The actual relationship between the issue and African American benefits is much less relevant than the perception. See *id.*

<sup>321</sup> Bell, *supra* note 75, at 79.

<sup>322</sup> See *supra* Part III.A–B.

<sup>323</sup> Although some would maintain that slow and steady progress is made from the process of advancement and setback, history shows that the conditions of the particular time period examined better predict the experience of African Americans than the passage of time alone. See *supra* Part III.A–B; see also BLACK PROTEST THOUGHT, *supra* note 75, at 194–95. See generally Bell, *supra* note 75. As shown above, laws were more oppressive and restrictive regarding African Americans from 1819 to 1865 than they had been over the preceding two hundred year history—consider the Dred Scott decision of 1856. See *supra* Part III.A–B. In short, African Americans had and still have nothing in American law that they can depend on to ensure that the white majority will not again reverse itself and subject African Americans to oppressive practices worse than or comparable to those of the past. See *supra* Part III.A–B. This article argues that African Americans must develop and institutionalize power in a domestic and international context that can help forestall if not prevent certain setbacks.

was a mistake.<sup>324</sup> In this regard, he recognized that the Constitution could not “be anything more than the controlling elements of the society wish[ed] it to be” and that the courts and legislatures could not make it be anything more than “what American public opinion wish[ed] it to be.”<sup>325</sup> Bunche, like Bell, bases his conclusions on his experiences as an activist and an academic.<sup>326</sup> Accordingly, both of these men recognized that political and economic dynamics rooted in the needs and wishes of the white majority dictated blacks’ opportunities, rather than the ideals articulated in judicial cases or constitutional amendments.<sup>327</sup>

My analysis of Bell, Bunche, and Crenshaw demonstrate that African Americans can not “count on the law” alone as the guarantor of their freedom, much less as the means to secure reparations for three and one half centuries of mistreatment.<sup>328</sup> Instead, this article suggests that African Americans use other means to ensure that past harms from slavery, segregation, and legal subordination are repaired and their communities restored.

## V. RACE AND REPARATIONS

Blacks still retain a valuable, though underutilized, resource to provide their communities with the educational, political, and economic institutions needed to enable community members to fully enjoy

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<sup>324</sup> BLACK PROTEST THOUGHT, *supra* note 75, at 183; *see also* Greene, *supra* note 82, at 1539-40 (providing an insightful consideration of Bunche’s theory in light of Supreme Court jurisprudence).

<sup>325</sup> Greene, *supra* note 82, at 1540.

<sup>326</sup> Bell, *supra* note 75, at 91-92.

<sup>327</sup> This does not suggest that landmark judicial cases, legislation, and constitutional amendments have been insignificant to African American well-being, but that these legal mechanisms only have the authority that the broader society invests in them. Accordingly, the Fifteenth Amendment operated as a dead letter law for most African Americans from 1875 to 1968. *See generally* RACE, LAW, AND AMERICAN HISTORY, *supra* note 271. Though intended to enfranchise African American men, neither the state nor the federal courts stopped the wholesale disenfranchisement of African American men and eventually women over a ninety-three year history. BLACK PROTEST THOUGHT, *supra* note 75, at 195. If the establishment of laws alone secured the freedoms they intended, then as Malcolm X often pointed out, there would have been no need to pass civil rights legislation to secure voting rights. *See generally* Malcolm X, *It’s the Ballot or the Bullet*, 60 MILITANT (1964) (providing context for Malcolm X’s statement). Likewise, if the state and federal governments of today lose their political will to protect the rights of African Americans, the various laws of the civil rights regime will be of little value.

<sup>328</sup> *See supra* Part III.A-B.

their civil liberties: each other.<sup>329</sup> The approach to reparations advanced in this article calls for a particular conception of race rarely engaged by those focused upon the traditional civil rights struggle: race-consciousness. This consciousness and its relationship to the civil rights advocacy over the past twenty-five years are skillfully explored by Gary Peller in his article of the same name.<sup>330</sup> This article intends to highlight the importance of a race-conscious approach to remedying the harms of slavery and segregation.

Peller contends that current liberal conceptions of race result from a "tacit consensus" that "the replacement of prejudice and discrimination with reason and neutrality—is the proper way to conceive of racial justice . . . ."<sup>331</sup> Nationally, the cost of the commitment to reject white supremacy, he argues, was "the rejection of race consciousness among African Americans."<sup>332</sup> This rejection, Peller explains, grew out of the "integrationist perspective" that defined racism in terms of irrationality growing from ignorance and superstition.<sup>333</sup> This ignorance results in bias and prejudice that cloud rational judgment based on non-racial criteria.<sup>334</sup> As a result, rather than biased decision-making based on racial groups, integration resulted in decision-making rooted in individual identity.<sup>335</sup> Peller writes:

Once neutrality replaced discrimination, equal opportunity would lead to integrated institutions; experience in integrated institutions would, in turn, replace the ignorance of racism with the knowledge that actual contact provides. This deep link between racism and ignorance on the one hand, and integration and knowledge on the other hand, helps explain the initial focus of integrationists on public education: Children who attended integrated schools would learn the truth

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<sup>329</sup> This article's commendation of self-reliance and self-determination neither rejects nor minimizes the contribution that well meaning whites, Latinos, Asians, and Native Americans can make to such efforts. Nevertheless, blacks will have to play a primary role in the creation, development, and implementation of a system that cements the sustained use and availability of economic, political, and cultural resources.

<sup>330</sup> See generally Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

<sup>331</sup> *Id.* at 760.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 768.

<sup>334</sup> *Id.* at 768–69.

<sup>335</sup> *Id.* at 770.

about each others' unique individuality before they came to believe stereotypes rooted in ignorance.<sup>336</sup>

These views, Peller notes, grew out of a high level of abstraction rooted in a type of universalism that associates particularism with ignorance and universalism with truth.<sup>337</sup> Through this lens, he points out, "racism becomes equivalent to other forms of prejudice and discrimination based on irrational stereotype. Social domination based on race, gender, sexual preference, religion, age, national origin, language, and physical disability or appearance can all be categorized as the same phenomenon because they all represent bias . . . ."<sup>338</sup> This bias, he makes clear, represents a deviation from a rational standard rooted in neutral principles.<sup>339</sup> As a result of the abstraction, the relationships between Anglos and other groups, such as African Americans and Hispanics, are all viewed through the lens of discrimination against racial minorities in legal and political dialogue.<sup>340</sup> This view, that focuses upon numeric terms rather than particular historic contexts, represents a uniform understanding of "discrimination."<sup>341</sup> From this perspective, anyone can be a victim of racism and anyone can practice it because racism represents a "deviation from a universal norm of objectivity."<sup>342</sup> As a result, Peller explains, "power relations" and "historical contexts" have no relationship to the integrationist conception of racism.<sup>343</sup> Instead, racism is understood as "possessing a race-consciousness" that sees race as a relevant factor in social relations.<sup>344</sup>

Peller contrasts the integrationist perspective with the race-consciousness framework of black nationalism during the 1960s and 1970s.<sup>345</sup> At the core of the disagreement is the conception of the person. Within liberal ideology the individual seeks independence from the constraints of group identity in social relations to attain freedom, while under nationalist ideology the basis of social relations flows out

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<sup>336</sup> Peller, *supra* note 330, at 770.

<sup>337</sup> *Id.* at 772.

<sup>338</sup> *Id.* at 773.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> Peller, *supra* note 330, at 773.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 773–74.

<sup>345</sup> *Id.* at 773–95. Peller points out that the nationalists rejected integration on multiple grounds, often incomprehensible to integrationists because of their rejection of the liberal theories at the foundation of integrationist ideology.

of a particularist history that provides the basis for social meaning.<sup>346</sup> From the nationalist perspective, “[n]ationhood, understood as a historically created community, assumes that social bonds of identity, recognition, and solidarity can be liberating and fulfilling . . . .”<sup>347</sup> Under this view, the liberal notion of whites and blacks as essentially “the same” is rejected for the view that whites and blacks are different, “in the sense of coming from different communities, neighborhoods, churches, families, and histories . . . .”<sup>348</sup> This outlook, Peller notes, flows from an understanding that successive generations of blacks and whites, experienced “dissimilar conditions of life,” which provided the basis for a group identity distinct from the traditional liberal notions governing group/individual relations.<sup>349</sup> The nationalist argument, consequently, challenged the commitment to universality over particularity and the ostensible “objectivity” and “neutrality” in social relations that allegedly accompanied it.<sup>350</sup>

The remainder of this review of race-consciousness focuses on the group relations dynamic implicit in the nationalist perspectives discussed by Peller. In an examination of school integration, Peller illustrates that nationalists sought local control of schools and resources to guide and direct the education of black children, thereby rejecting the integrationists’ idea that improved education for black children meant educational association with white children and assimilation into the predominant culture. Black nationalist Stokely Carmichael once explained: “The goal is not to take black children out of the black community and expose them to white middle-class values: the goal is to build and strengthen the black community . . . .”<sup>351</sup> The integrationist sought the “integration” of blacks into the white community as individuals whose racial identity was irrelevant. Nationalists, on the other hand, wanted to develop the “black community” through the transfer of resources and power—integration

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<sup>346</sup> *Id.* at 793–95.

<sup>347</sup> *Id.* at 794.

<sup>348</sup> Peller, *supra* note 330, at 792.

<sup>349</sup> *Id.* at 793.

<sup>350</sup> *Id.* at 804. Peller points to two principle disagreements the nationalist perspective raised to those notions—the necessity and value of local control and the false objectivity of norms and standards developed under systems of racial exclusion and domination. Concerning false objectivity claims Peller explains, “[a]ccording to nationalists in the 1960s, these traditional categories of liberal and enlightenment thought do not constitute an aracial or culturally neutral standard that measures social progress in overcoming partiality, parochialism, and bias; rather they are simply elements in the dominant worldview of white elites.” *Id.* at 803.

<sup>351</sup> *Id.* at 795.

had almost the opposite effect by redirecting resources and people away from the community.<sup>352</sup> The result of this trend, nationalists feared, would be the elimination of the black community.

The nationalists' fears were not realized, but another travesty did result. African American communities and institutions lost very important resources and support essential to their survival.<sup>353</sup> Many of these institutions and resources had been developed with a reparative element that sought to build educational, economic, and other resources denied under the "Reign of Terror."<sup>354</sup> Consequently, the redirection of resources and support away from African American communities led to the elimination of some and the evisceration of other institutions operating with a reparative mission.

This present reality coincides with the view of the historical subordination of blacks under the "Reign of Terror" adopted in this article. Rather than the "cognitive distortion of stereotype and prejudice" identified by Peller as the integrationist understanding of racism, the examination of law beginning this chapter suggests an analysis rooted in the development of laws and policies intended to preserve the benefits derived from black subordination.<sup>355</sup> From the laws proscribing the education of enslaved and "free" blacks, to the "lawful" disenfranchisement of most blacks throughout the past three centuries, white racial domination was a way of preserving the socioeconomic benefits of racism. This article thus challenges the view that the American legal system will act contrary to what is perceived by the majority of whites as in their best interests. More specifically, the courts are unlikely to require, against the wishes of the white majority, that

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<sup>352</sup> Peller explains:

Hence, rather than providing the material means for improving the housing, schools, cultural life, and economy of black neighborhoods, nationalists saw mainstream race reform as entailing 'progress' only through blacks moving into historically white neighborhoods, attending historically white schools, participating in white cultural activities, and working in white-owned and white-controlled economic enterprises.

*Id.* at 797.

<sup>353</sup> *Id.* at 845–46.

<sup>354</sup> See Waterhouse, *supra* note 22, for an examination of the reparative nature of historic black institutions.

<sup>355</sup> The *Dred Scott* opinion, the Fugitive Slave Act, and various laws designed to disenfranchise blacks reflected decisions intended to preserve material and psychological benefits derived from the subordination of blacks. FEAGIN, *supra* note 61, at 24, 205. These laws represented group-based decision-making that constrained black life based on group membership rather than individual characteristics. *See id.*

today's society take responsibility for repairing harms that the previous society deemed in their and their offspring's best interests.

White baby boomers represent the chief living beneficiaries of the white domination of the previous centuries.<sup>356</sup> These benefits, however, are rendered invisible in the liberal conception of race, so that accomplishments are viewed in exclusively individualistic terms that disregard superior access to resources and opportunities based on racial criteria for that generation and the preceding generations. Hence, contemporary power relations are based on neutral principles of objectivity that deny racial significance and instead are based on individual achievement. Justice Scalia demonstrates this view in his opinion in *Adarand Constructors, Inc. v. Peña* in which he wrote:

Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual . . . . To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.<sup>357</sup>

In his opinion, Justice Scalia associates race-consciousness under the Constitution with the racial subordination associated with historic white supremacy.<sup>358</sup> This perspective adopted by Justice Scalia promotes a revisionist view of history that faults racially-based government action as the basis for historic injustice rather than the democratically expressed bias of the nation's racial majority.<sup>359</sup> Accordingly, Justice Scalia's view equates race-neutral principles with racial justice—although the poll taxes, literacy tests, and grandfather clauses of the Jim Crow South show how racially-neutral legal principles can serve to protect racial majoritarian bias in the law.<sup>360</sup>

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<sup>356</sup> As the living beneficiaries of lawful discrimination in wages, education, and politics during the first sixty-three years of the twentieth century, these persons directly benefited from the exclusion of blacks from economic, educational, and political competition. See FEAGIN, *supra* note 61, at 175–92.

<sup>357</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (citations omitted).

<sup>358</sup> *Id.* at 240–41.

<sup>359</sup> *Id.*

<sup>360</sup> In light of the fact that these “race neutral” laws were passed by popularly elected legislators and upheld by numerous judges before they were overturned through legisla-

Under this view, slavery and discrimination are characterized as acts of individual choice based on race-consciousness rather than a systematic racial subordination secured through neutral principles of law. Contrary to this claim, the legal survey at the beginning of the article illustrates that discrimination was regularly a collective decision provided through “democratic” and Constitutional means.<sup>361</sup> These collective decisions take the form of legislation and judicial reasoning that allows and frequently requires black subordination. Consider the laws prohibiting black education, employment in certain trades, ownership of property, and voting as a few examples.<sup>362</sup> Persons treating blacks as equals in these instances were subject to punishment by the community for breaching the norm that demanded black subordination. In this context, it becomes more apparent how racism, defined as an individual expression of bias, serves to hide the collective nature of white domination and the governmental and institutional structures that maintained it. Contemporary American society rejects responsibility for the historical decisions of some of its citizens to enslave blacks and otherwise discriminate against them. It has yet, however, to accept that slavery and segregation reflected the collective choice of the predominant white society as expressed through the decisions of democratically elected local, state and federal officials.<sup>363</sup>

By employing a race conscious view, the necessity that blacks turn to themselves to repair the harms of slavery, segregation, and legal subordination suffered by their communities becomes more apparent.<sup>364</sup> To see reparations manifest, blacks, like the Baudelaire children in Lemony Snicket’s tale, will have to look to their own resources and abilities to secure the remediation of longstanding harms.<sup>365</sup> In

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tion and judicial decisions, it would seem clear that the evil at issue was the majority’s racial bias that can be readily expressed through neutral principles as well explicit racial designations. See BLACK PROTEST THOUGHT, *supra* note 75, at 196–201.

<sup>361</sup> See *supra* Part III.A–B.

<sup>362</sup> See *supra* Part III.A–B.

<sup>363</sup> A legal system that ignores the historic domination of social relations by whites through the society’s institutions of power, including the law itself, and instead focuses solely on individualized experiences of race divorced from the distribution of power and resources over three centuries, seems an unlikely candidate to remedy the race based harms that it today renders invisible.

<sup>364</sup> See Waterhouse, *supra* note 22. This argument in no way suggests that African Americans are culpable for the harms associated with slavery and segregation. This article distinguishes the culpability for past harms from the responsibility that a person or a community has to itself to remedy the damage that others caused.

<sup>365</sup> This suggestion in no way supports the claims of those opposing black reparations as unfair to America and its citizens or as counterproductive. Arguments rooted in the contemporary generations’ rejection of responsibility for its predecessors’ wrongdoing,



making that decision, blacks do not divorce themselves from aid or assistance of others or even the use of the legal system, when viable. Instead, they recognize their own centrality in determining their own future and their ability to prosper despite the series of unfortunate events behind them and probably ahead of them.

### CONCLUSION

To meet the goal of reparations to provide black communities with the educational, political, and economic resources necessary to enable their members to exercise and enjoy their civil liberties, I propose a plan of institutional development.<sup>366</sup> The development I propose facilitates the enjoyment of freedom envisioned by abolitionists Benjamin Franklin and Wendell Phillips and embellished by moral philosopher Timothy Jackson in his discussion of *libertas*.<sup>367</sup> This approach takes full account of the limitations of the legal system in securing community remediation, in accord with the political sensibilities of Ralph Bunche and the "racial realism" of Derrick Bell. Finally, the solutions proposed herein embrace the race-consciousness counseled by Gary Peller as a vital component of an institutional approach to reparations.

Community well-being and the quality of life of community members have been shown to correlate with the strength of community institutions.<sup>368</sup> In the most depressed and blighted communities in America, the educational, political, and economic institutions range from weak to non-existent.<sup>369</sup> To repair the longstanding harms resulting from the "Reign of Terror," I advance the creation of new and the reformation of existing black educational, political, and economic institutions. My proposal begins with the creation of three independent trust funds: the Educational Fund, the Political Fund, and the Economic Fund. Each of these funds will operate in accordance with a governing

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while it enjoys the benefits of those same actions appear self-serving and are unpersuasive. Likewise, the rejection of black reparations claims based on their potential to harm contemporary race relations seem speculative and an insufficient basis to neglect the redress of slavery and segregation based harms.

<sup>366</sup> See *supra* Part I.

<sup>367</sup> See *supra* Part I.

<sup>368</sup> James Peach, *Regional Income Inequality Revisited: Lessons from the 100 Lowest-Income Counties in the United States*, in *INEQUALITY: RADICAL INSTITUTIONALIST VIEWS ON RACE, GENDER, CLASS, AND NATION* 237, 238, 245–47 (William M. Dugger ed., 1996). See generally WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1997) for an in depth examination of the relationship between community economic institutions and the well-being of residents.

<sup>369</sup> Peach, *supra* note 368, at 245–47.

charter to guide it in funding organizations and institutions committed to building black communities.<sup>370</sup>

Educational reparations would focus on improving the education provided to the youth of black communities. To accomplish this, I suggest that the Educational Fund provide grants to aid in the establishment of charter schools in black communities. These schools would be open to all children, but their curricula would be geared toward meeting the educational needs of black children. Similar to businesses funded by the Economic Trust, schools gaining support would show their commitment to promoting the values adopted by the Education Trust. Trust-sponsored schools would retain their freedom to design their charters in different ways as long as the values of the Education Trust are included.<sup>371</sup> School types should vary widely to include diverse educational foci such as math and science, performing arts, international language and culture, and public service among others. Along with seeding the creation of new charter schools, the Educational Fund would support the creation and expansion of private academies open to all students but dedicated to meeting the educational needs of black youth. My proposal also includes substantial funding for targeted programming by historically black colleges and universities. These grants would cover scholarships and fellowships for students, endowed chairs for faculty, as well as reparations related research. The Educational Fund would also make scholarships and fellowships available to undergraduate, graduate, and professional students at majority institutions who commit to black institutional service.

The focus of the Political Fund would be the creation and development of black political institutions. This trust would have the responsibility for funding institutions and organizations that enhance the political awareness of black community members and increase their political influence. While these organizations would demonstrate a commitment to the communal and other values proffered by the Political Fund, they could use a variety of means and approaches tailored to their primary constituency. Black political institutions would likely begin with a local and regional focus by organizing the black electorate in the southern states and a selection of large cities with substantial

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<sup>370</sup> The values anchoring the charters of the three trusts emanate from the African American holiday of Kwanzaa. Unity, Purpose, Collective Work and Responsibility, Cooperative Economics, Faith, Creativity, and Self Determination serve as communal values to guide trust operations.

<sup>371</sup> Along with the communal values identified above excellence, other values would become necessary parts of sponsored schools charters.

black populations.<sup>372</sup> Sponsored institutions would develop constituent support by designing local and regional goals and objectives in light of the political ideologies of black communities.<sup>373</sup> One organization might be a non-partisan issue oriented membership organization. This organization would operate through local chapters and a national policy office. It will conduct grass roots organizing to inform residents about the political process and then support their involvement around local and regional issues. Young adult involvement, education, and organizing should be a fundamental strategy of this organization. By training and involving youth, the organization furthers two critical objectives: 1) strengthening its volunteer workforce, and 2) building a foundation for future political organizing.

My proposal also includes the creation of a Bethune Washington Institute to support the scholarship mandate of the reparations charter. The Institute would operate like the Brookings Institute as a non-partisan organization committed to supporting the research of a wide range of scholars related to questions of reparations. Scholars with full-time commitments to other institutions would serve as affiliates working along with Institute fellows in conducting research, publishing findings and making policy recommendations based on that research. Beyond governmental policy, Institute scholarship would address the political, educational, economic, and legal policies of private groups and individuals. Through the work of the Institute, black educational, political, and economic institutions committed to reparations would receive meaningful insights into fulfilling their objectives. Furthermore, fellows can address relevant questions regarding cultural, medical, and familial reparations through research, publication and the use of developed networks of dissemination.

In the economic realm, I propose that the trust support the development of new and existing black businesses that demonstrate a commitment to the goal of reparations. Enhancing the quality and number of black businesses serves two purposes: providing jobs and increasing the availability of quality goods and services to community members. Specific businesses ideas could include such as a national newspaper and a major production studio for the creation of television and cin-

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<sup>372</sup> Cities would include Chicago, Detroit, New York, Philadelphia, Houston, and Los Angeles.

<sup>373</sup> These ideologies cover a spectrum that includes disillusioned liberals, nationalists, feminists/womanists, Marxists/egalitarians, and conservatives. *See generally* MICHAEL C. DAWSON, *BLACK VISIONS: THE ROOTS OF CONTEMPORARY AFRICAN-AMERICAN POLITICAL IDEOLOGIES* (2001).

ema productions, collaborative business ventures with Caribbean and African nations, and development programs focused on training black youth for future business ownership and management.

These programs would compose a communal approach to reparations rooted in the formation and reformation of black institutions. This approach differs from the prevailing notions of reparations focused on legal theory or congressional enactment, in its independence from governmental action and its emphasis on institutional development. Rather than a court-ordered remedy or a legislative design, my proposal begins and ends with black communal action.<sup>374</sup> In this sense blacks, like the Baudelaire orphans, will use their own abilities to secure their futures in the world. In the event that those who owe them duties and responsibilities meet their obligations, they can accept their acts with pleasure as a complement to their own efforts. By focusing on their own abilities and initiative, however, blacks need not risk the disappointment and damage that might result from the ongoing series of unfortunate legal events.

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<sup>374</sup> It is worth noting that this approach does not foreclose monetary awards obtained from legal action by the judiciary or legislative branches of the American government. My proposal, however, allows the integration of legally based awards into the funding scheme for the three reparations trust funds contemplated within my proposal, though it is not dependent upon such awards. See Waterhouse, *supra* note 22 for a full elaboration of my proposal, including the institutional mechanisms, motivations, and funding methodology.

